133

(1)

Supreme Court, U.S.
FILED

No. 09-70

JUL 16 2009

OFFICE OF THE CLERK
William K. Suter, Clerk

In The

Supreme Court of the United States

MODERN, INC., et al.,

Petitioners,

v.

ST. JOHNS RIVER WATER MANAGEMENT DISTRICT, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

*DAVID SMOLKER
**Counsel of Record*
ETHAN J. LOEB
MATHEW C. LUCAS
BRICKLEMYER SMOLKER & BOLVES, P.A.
500 E. Kennedy Blvd., Suite 200
Tampa, Florida 33602
813-223-3888
Attorneys for Petitioners

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

The Eleventh Circuit Court of Appeals affirmed the district court's judgment rejecting Petitioner's claim that the St. Johns River Water Management District's interference with Petitioner's ability to abate the flooding of its property using an existing drainage canal system amounted to a taking.

Does the Eleventh Circuit's decision directly conflict with this Court's decision in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) and with various circuit courts of appeals' decisions and the Florida Supreme Court's decision in *Storer Cable T.V. of Florida, Inc. v. Summerwinds Apartments, Associates, Ltd., et al.*, 493 So. 2d 417 (Fla. 1986) which adopt and apply *Loretto*?

Did the Eleventh Circuit commit reversible error by affirming the district court's confusing and incomplete rulings effectively rejecting Petitioner's common law flowage easement claim against the United States under the Federal Quiet Title Act, 28 U.S.C. § 2409a?

Does the Eleventh Circuit's affirmance of the district court's judgment amount to a judicial taking in violation of the Fifth and Fourteenth Amendments to the United States Constitution?

ALL PARTIES TO THE PROCEEDINGS

Modern, Inc., a Florida corporation, Petitioner
First Omni Service Corporation, a Florida corporation, Petitioner
State of Florida Department of Transportation, Respondent
United States of America, Respondent
St. Johns River Water Management District, Respondent
The Great Outdoors Premier R.V./Gulf Resort, Inc., Respondent
Brevard County, Florida, Respondent

DISCLOSURE STATEMENT PER RULE 29.6

There are no parent corporations or publicly held companies owning 10% or more of the Petitioners' stock.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
ALL PARTIES TO THE PROCEEDINGS	ii
DISCLOSURE STATEMENT PER RULE 29.6	ii
TABLE OF AUTHORITIES	viii
OPINIONS BELOW	1
JURISDICTION	1
RELEVANT CONSTITUTIONAL AND STATUTORY PROVISONS INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE PETITION	8
I. The Eleventh Circuit's Decision Directly Conflicts With This Court's Decision In *Loretto v. Teleprompter Manhattan CATV Corp.*, Various Circuit Courts Of Appeals' Decisions And The Florida Supreme Court's Decision In *Storer Cable T.V. of Florida, Inc. v. Summerwinds Apartments, Ltd., et al.*	9
A. Relevant Background Principles Of Florida Property Nuisance Law	10
B. The Eleventh Circuit's Decision Directly Conflicts With *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982)	16

TABLE OF CONTENTS – Continued

Page

C. The District Court's Findings Affirmed By The Eleventh Circuit Establish A *Per Se* Taking Under *Loretto* And Its Progeny 18

D. The Eleventh Circuit's Decision Directly Conflicts With Its Own Prior Precedent And That Of Various Other Circuit Courts Of Appeals 25

E. The Eleventh Circuit's Decision Directly Conflicts With The Florida Supreme Court Decision In *Storer Cable T.V. of Florida, Inc. v. Summerwinds Apartments Associations, Ltd.* 26

II. This Court's Review Is Necessary To Address Modern's Reserved Federal Taking Claims Which May Otherwise Be Barred By Florida Issue Preclusion Principles Under *San Remo Hotel, L.P. v. City & County of San Francisco, California* 27

III. The Eleventh Circuit's Affirmance Of The District Court's Confusing And Incomplete Rulings Effectively Rejecting Petitioner's Common Law Flowage Easement Claim Against The United States Under The Federal Quiet Title Act, 28 U.S.C. § 2409 Constitutes Reversible Error 28

TABLE OF CONTENTS – Continued

Page

IV. The Eleventh Circuit's Affirmance Of The District Court's Judgment Directly Conflicts With This Court's Decision In *Palazzolo v. Rhode Island, et al.*, And Amounts To A Judicial Taking 29

CONCLUSION 32

APPENDICES:

January 21, 2009 Eleventh Circuit Court of Appeals Order Affirming Per Curiam ..... App. 1

January 30, 2008 District Court Amended Memorandum Opinion ..... App. 3

Exhibit to January 30, 2008 District Court Amended Memorandum Opinion ..... App. 41

August 16, 2006 Amended Order on the United States Motion to Dismiss, or in the Alternative, Motion for Summary Judgment ..... App. 42

June 8, 2006 Order on Modern's Motion for Summary Judgment ..... App. 61

April 14, 2004 Order on Motions to Dismiss Modern's Third Amended Complaint ..... App. 97

April 17, 2009 Eleventh Circuit Court of Appeals Order Denying Motion for Rehearing and Rehearing En Banc ..... App. 141

TABLE OF CONTENTS – Continued

Page

Various Excerpts of Trial Transcript

a. pp. 55-60 (Testimony of Charles Moehle) ... App. 143

b. pp. 325-328 (Testimony of Michael Moehle) ..... App. 150

c. pp. 352-355 (Testimony of Robert Sprinkle) ..... App. 155

d. pp. 396-398 (Testimony of Robert Sprinkle) ..... App. 159

e. pp. 716-719 (Testimony of Robert Sprinkle) ..... App. 163

f. p. 1010 (Testimony of Robert Sprinkle)... App. 169

g. p. 1204 (Testimony of Rochelle Lawandales) ..... App. 171

h. pp. 1957-1967 (Testimony of Ralph Brown)..... App. 173

i. pp. 1985-1986 (Testimony of Ralph Brown)..... App. 186

j. pp. 2001-2003 (Testimony of Murray Lad Hawkins)..... App. 190

Various Trial Exhibits Admitted Into Evidence

a. Excerpts from Plaintiffs' Exhibit A283 (Recommended Order)..... App. 195

b. Defendant's Ex. A5, sheets 11-12 (survey of impounded waters and weirs)..... App. 203

c. Defendant's Ex. A11, pp. 1-2 (water impounded in EW-1 at elevation 12.8 feet) .. App. 205

TABLE OF CONTENTS – Continued

Page

d. Defendant's Ex. A65, p. 9 (showing hydrograph depicting 100-year flood elevation of approximately 12.7 near Modern's Property).....App. 207

Modern's Fourth Amended Complaint (exhibits omitted).....App. 208

TABLE OF AUTHORITIES

Page

CASES:

Agripost, LLC, v. Miami-Dade County, Florida, 525 F. 3d 1049 (11th Cir. 2008).....27

Armstrong v. United States, 364 U.S. 40 (1960).....32

Associates of Meadow Lake, Inc. v. City of Edgewater, 706 So. 2d 50 (Fla. Dist. Ct. App. 5th Dist. 1998).....15

Azul Pacifico, Inc., v. City of Los Angeles, 948 F. 2d 575 (9th Cir. 1991) 21, 25

Blackburn v. State of Alabama, 354 U.S. 393 (1957).....29

Boise Cascade Corp. v. U.S., 296 F. 3d 1339 (Fed. Cir. 2002).....20

Brumley v. Dorner, 83 So. 912 (Fla. 1919) 12

Cable Holdings of Georgia, Inc. v. McNeil Real Estate Fund VI, Ltd., et al., 953 F. 2d 600 (11th Cir. 1992).....25

Chicago Burlington & Quincy R.R. Co. v. Chicago, 166 U.S. 226 (1897).....31

City of Jacksonville v. Schumann, 167 So. 2d 95 (Fla. Dist. Ct. App. 1st Dist. 1964) 15

Corn v. State, 332 So. 2d 4 (Fla. 1976).....14

Drake v. Walton County, 6 So. 3d 717 (Fla. Dist. Ct. App. 1st Dist. 2009).....13

Edason v. Denison, 194 So. 342 (Fla. 1940).....12

TABLE OF AUTHORITIES – Continued

Page

England v. Louisiana State Board of Medical Examiners, 375 U.S. 411 (1964) 27

Everglades Sugar & Land Co. v. Bryan, 87 So. 68 (1921) 11

F.C.C. v. Florida Power Corporation, et al., 480 U.S. 245 (1987) 24

Fleming v. State Road Dept., 25 So. 2d 376 (Fla. 1946) 13

Greenfield Mills, Inc. v. Macklin, 361 F. 3d 954 (7th Cir. 2004) 21, 26

Gulf Power Co. v. U.S., 187 F. 3d 1324 (11th Cir. 1999) 26

Hage v. United States, 35 Fed. Cl. 147 (Fed. Cl 1996) 21

Hall v. City of Santa Barbara, 833 F. 2d 1270 (9th Cir. 1987) 25

Hart v. Stern, 824 So. 2d 927 (Fla. Dist. Ct. App. 5th Dist. 2002) 22

Hendler v. United States, 952 F. 2d 1364 (Fed. Cir. 1991) 19, 20, 25

Hughes v. Washington, 389 U.S. 290 (1967) 31

Jennings v. Caddo Parish School Board, 531 F. 2d 1331 (5th Cir. 1976) 27

Kaiser Aetna v. United States, 444 U.S. 164 (1979) 19

Keshbro, Inc. v. City of Miami, 805 So. 2d 864 (Fla. 2001) 27

TABLE OF AUTHORITIES – Continued

Page

Lamb v. Dade County, 159 So. 2d 477 (Fla. Dist. Ct. App. 3d Dist. 1964).....13

Leek v. Brasfield, 290 S.W. 2d 632 (Ark. 1956).....23

Libby v. Roberts, 110 So. 82 (Fla. 1959).....12

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).....*passim*

Modern, Inc., et al. v. State of Florida, et al., 2008 WL 239148 (M.D. Fla. Jan. 28, 2008).....1

Modern, Inc., et al. v. State of Florida, et al., 2009 WL 137503 (11th Cir. Jan. 21, 2009).....1

Monell v. New York City Dept. of Social Servs., 436 U.S. 658 (1978).....23

Nixon v. U.S., 978 F. 2d 1269 (D.C. Cir. 1992) 25

Nollan v. California Coastal Commission, 483 U.S. 825 (1987).....19

Palazzolo v. Rhode Island, et al., 533 U.S. 606 (2001).....29, 30

Parrish v. Parrish, 94 S.E. 315 (Ga. Ct. App. 1917).....22, 23

Pearce v. Pearce, 97 So. 2d 329 (Fla. Dist. Ct. App. 2d Dist. 1957) 12

Pinewood Estates of Michigan, et al. v. Barnegat Township Leveling Board, 898 F. 2d 347 (3rd Cir. 1990) 24, 25

Pumpelly v. Green Bay Co., 13 Wall. (80 U.S.) 166 (1871).....*passim*

TABLE OF AUTHORITIES – Continued

Page

Ridgeline, Inc. v. U.S., 346 F. 3d 1346 (Fed. Cir. 2003) 22, 26, 29

Robinson v. Ariyoshi, 753 F. 2d 1468 (9th Cir. 1985), *rev'd on procedural grounds*, 477 U.S. 902 (1986) 32

San Remo Hotel, L.P. v. City & County of San Francisco, California, 545 U.S. 323 (2005) 27

Seaboard All Florida Ry. Co. v. Underhill, 141 So. 409 (Fla. 1932) 15

Seminole County v. Mertz, 415 So. 2d 1286 (Fla. Dist. Ct. App. 5th Dist. 1964) 12

Skip Kirchdorfer, Inc. v. United States, 6 F. 3d 1573 (Fed. Cir. 1993) 19, 25

Stevens v. City of Cannon Beach, 510 U.S. 1207, 114 S.Ct. 1332 (1994) 30

Stoll v. MacPherson Duck Club, Ltd., 607 P. 2d 1019 (Colo. Ct. App. 1979) 14

Storer Cable T.V. of Florida, Inc. v. Summerwinds Apartments, Associates, Ltd., et al., 493 So. 2d 417 (Fla. 1986) ..... *passim*

Town of Miami Springs v. Lawrence, 102 So. 2d 143 (Fla. 1953) 15

U.S. v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985) 21

Walton County v. Stop the Beach Renourishment, Inc., 998 So. 2d 1102 (Fla. 2008), *cert. granted*, 2009 WL 688854 (U.S. Fla. June 15, 2009) (No. 08-1151, 2009 Term) 30

TABLE OF AUTHORITIES – Continued

Page

Webbs Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155 (1980) 30, 31

Wetzel v. A. Duda & Sons, 306 So. 2d 533 (Fla. Dist. Ct. App. 4th Dist. 1975) 15

Zigman v. Cline, 664 So. 2d 968 (Fla. Dist. Ct. App. 4th Dist. 1995) 22

CONSTITUTIONAL PROVISIONS:

U.S. Const. Amend. V 2, 33

U.S. Const. Amend. XIV 31

Fla. Const. Art. I § 2 14

Fla. Const. Art. X § 6 ..... 2, 6, 33

Fla. Const. Art. XI § 2 12

STATUTES:

28 U.S.C. § 1254(1) 1

28 U.S.C. § 2409a 2, 7, 9, 28

42 U.S.C. § 1983 22

Fla. Stat. § 2.01 10

Fla. Stat. § 83.66 (Supp. 1982) 26

Fla. Stat. § 253.001 12

Fla. Stat. § 298.66 (2008) 14

Fla. Stat. § 373.403(8) 5

Fla. Stat. § 373.413(1) 5

TABLE OF AUTHORITIES – Continued

Page

Fla. Stat. § 373.416(1) 5

Fla. Stat. § 403.813(1) 5

Fla. Stat. § 403.813(2) 5

Fla. Stat., Chapter 120 5

Fla. Stat., Chapter 373 .....*passim*

Swamp Lands Act of 1850 .....11, 12

MISCELLANEOUS:

Sup. Ct. R. 10(a) 10, 29

Sup. Ct. R. 10(c) 10, 28, 29

Chapter 610, Laws of Florida (1854) 12

Chapter 4178, Laws of Florida (1893) 12

Chapter 5035, Laws of Florida (1901) 12

Chapter 6458, Laws of Florida (1913) 12

Restatement (Second) of Torts § 201 (1965) 15, 23

Blackstone, Sir William, *Commentaries on the Laws of England*, (Thomas M. Cooley ed., 3d ed. Rev. 1884) 10

Epstein, Richard A., *Takings Private Property and the Power of Eminent Domain*, (1985) 22

Maloney, Frank E., et al., *Water Law and Administration: The Florida Experience*, (1968) 11

Thompson, Barton H., Jr., *Judicial Takings*, 76 Va. L. Rev. 1449 (1990) 32

PETITION FOR A WRIT OF CERTIORARI

Modern, Inc., respectfully petitions for a writ of certiorari to review the judgment of the Eleventh Circuit Court of Appeals.

OPINIONS BELOW

The United States Court of Appeals for the Eleventh Circuit affirmed, per curiam, the district court for the Middle District of Florida's opinion directing entry of final judgment against Petitioner, Modern, Inc. ("Modern"). The Eleventh Circuit's decision is unreported but can be found at 2009 WL 137503 (11th Cir. Jan. 21, 2009). (App. 1-2). The opinion of the district court is also unreported but can be found at 2008 WL 239148 (M.D. Fla. Jan. 28, 2008) (App. 3-41).

JURISDICTION

The decision of the Eleventh Circuit was handed down on January 21, 2009. A timely petition for rehearing en banc was denied on April 17, 2009. (App. 141-42). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The United States Constitution, Amend. V

> Nor shall any person . . . be deprived of . . . property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Florida Constitution (1968), Art. X, § 6(a)

> No private property shall be taken except for a public purpose and with full compensation therefor paid to each owner or secured by deposit in the registry of the court and available to the owner.

28 U.S.C § 2409a

> The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights.

STATEMENT OF THE CASE

The St. Johns River Water Management District ("St. Johns") deprived Modern of its ability to immediately abate the flooding of Modern's property by maintaining drainage canals designed to serve its property.

Modern owns approximately 65 acres of commercially developable property located at the northwest quadrant of the interchange of Interstate 95 and State Road 50 near Titusville, Florida. (App. 9 & 9, n. 8, 172, 190-93). A drainage canal system serves Modern's property and a large area upstream of Modern's property, including portions of the City of Titusville and the St. Johns National Wildlife Refuge. (App. 4-5, 7, 41, 155-67). The drainage system was originally constructed by the developer of the Titusville Fruit and Farmlands Subdivision between 1908 and 1919 in connection with the platting of the 12,800 acre subdivision and was subsequently expanded and enlarged. (App. 4-5, 41). Over time, the portions of the system critical to drainage of Modern's property, primarily canals known as East-West 1 ("EW-1"), North-South 1 ("NS-1") and the Indian River City Canal ("IRCC") had become blocked.[1] (App. 5-6 & n. 4, 36, 173-85). The blockages were due to a combination of lack of maintenance and, in all likelihood, inadvertent filling in of portions of these canals by the United States Fish and Wildlife Service ("USFWS") in connection with its restoration of

---

[1] EW-1 runs east to west across the northern portion of Modern's property and across the Refuge. NS-1 runs north to south across the Refuge north of Modern's property then across the western portion of Modern's property continuing south underneath SR 50 eventually reaching the Addison Canal. The IRCC runs east to west starting at the southwest corner of Modern's property and traversing the Refuge along its southern boundary. (App. 41).

wetlands on the Refuge adjacent to Modern's property.[2] (App. 8 & 8, n. 7, 11, 36, 39, 170). In January 1997, in order to relieve the flooding, Modern dredged the accumulated sediment and overgrown vegetation blocking portions of EW-1 and NS-1 located on or within the platted right-of-way immediately adjacent to its property, and deposited most of the materials on the adjacent, pre-existing spoil bank. (App. 11). As a result of the dredging, Modern's property, along with several hundred acres of wetlands located on the Refuge adjacent to Modern's property, began to drain. (App. 11). After USFWS complained, St. Johns issued an emergency order authorizing USFWS to install weirs to restore the blockages in NS-1 and EW-1 near their intersection adjacent to Modern's property. (App. 11). USFWS installed the weirs in May 1997. (App. 11). No long term harm to the environment resulted from Modern's activities.

Contending that Modern's excavation activities required a permit pursuant to chapter 373, Florida Statutes,[3] St. Johns also ordered Modern to fill in the

---

[2] The United States acquired the Refuge by deed or eminent domain by lot and block number with reference to the recorded Titusville Fruit and Farmlands subdivision plat "subject to other rights outstanding for existing roads, utility lines, pipelines, ***canals, and/or ditches***, if any."

[3] In 1972, the Florida Legislature enacted the Florida Water Resources Act of 1972, chapter 72-299, Laws of Florida, codified at chapter 373, Florida Statutes. The Act created water management districts, including St. Johns, and authorized them

(Continued on following page)

northernmost excavated portion of NS-1 and to bulldoze the freshly excavated materials along the remainder of NS-1 back into the canal. (App. 12-13). In response to St. Johns' orders, Modern initiated formal administrative proceedings pursuant to chapter 120, Florida Statutes, challenging the propriety of St. Johns' orders, and contending that its excavation activities constituted routine custodial maintenance which was excluded from St. Johns' permitting requirements pursuant to sections 373.403(8), 403.813(1) and 403.813(2), Florida Statutes.[4] (App. 12, 197-99). A hearing was held before an administrative law judge, who found that the dredging exceeded the scope of routine custodial maintenance, and recommended that St. Johns require Modern, among alternative restoration options, to fill back in the canal located on its property by bulldozing the freshly excavated material along the canal back into the canal.[5] (App. 12-13). St. Johns adopted this

---

to, among other things, regulate, subject to various exemptions, construction, alteration, maintenance and operation of surface water management systems, such as drainage ditches and canals, by requiring permits for such activities. Fla. Stat. §§ 373.413(1), 373.416(1) (1995).

[4] The exclusion permitted maintenance without a permit of existing drainage canals and ditches to their original design specifications. Fla. Stat. §§ 373.403(8), 403.813(1), 403.813(2)(f), 403.813(2)(g).

[5] The administrative law judge ruled that because the evidence before him was insufficient to establish the original design specifications, Modern's right of exempt maintenance was limited to maintaining EW-1 and NS-1 in their blocked condition. (App. 200). At trial below, Modern's drainage engineer

(Continued on following page)

recommendation and entered a final order upholding the propriety of its actions. (App. 13).

After unsuccessfully appealing St. Johns' final order to a Florida district court of appeal, Modern complied with the order and filled back in the portion of NS-1 located on its property from which the blockages had been removed. (App. 13). As a result of restoration and the weir installation ordered or authorized by St. Johns, Modern's property continues to flood for months at a time, especially during the summer rainy season, during which time floodwaters are impounded on Modern's property up to the elevation of a 100-year storm event. (App. 28-29, 143-49, 150-54, 203-07).

Modern then pursued a state court action seeking declaration of its common law drainage easement rights and inverse condemnation of its land and easement rights against St. Johns, among other parties, pursuant to the Florida Constitution's takings clause.[6] (App. 13, 14, 208-29). The state trial court required joinder of the United States with

---

testified that the original design specifications of NS-1 and EW-1 were 20-25 feet wide and 4-5 feet deep as of the late 1950s. (App. 164-66). St. Johns' drainage engineer, who inspected the maintenance work shortly after it was completed, testified that NS-1 had been excavated to a width of 16-17 feet and to a depth of 3-4 feet at the north end and slightly less at the south end near SR 50 where the pre-existing canal was deeper. (App. 188). Thus, as it turned out, Modern's dredging was within the original design specifications.

[6] See, Art. X § 6, Fla. Const. (1968).

respect to the issue of Modern's drainage easements. Once joined, the United States removed the case to the district court for the Middle District of Florida, Orlando Division. (App. 14). In Count IV of Modern's Fourth Amended Complaint, Modern explicitly sought relief against the United States as to the "existence, location, scope and extent" of its common law drainage easements under the Federal Quiet Title Act, 28 U.S.C. § 2409a. (App. 224-26).

The district court issued several pre-trial rulings relating to Modern's common law flowage easement claim. First, it rejected the Defendants' dispositive motion to dismiss argument that there is no common law right to accelerate surface water through artificially created ditches. (App. 133-34). Next, it granted summary judgment in favor of Modern as to St. Johns' claim that Modern had abandoned any drainage easements in the canal system. (App. 89-92). It also denied Modern's motion for summary judgment on its common law flowage easement claim against the United States. (App. 80-81). In so ruling, the district court acknowledged such right, but did not determine its extent, location and scope in relation to the drainage canal system. Finally, the district court granted summary judgment in favor of the United States on the issue of whether the United States had interfered with Modern's common law flowage easement. (App. 57-58).

After a bench trial, the district court entered a Memorandum Opinion directing entry of final judgment against Modern on all its remaining claims. (App. 3-41). In so doing, the court rejected Modern's

common law flowage easement claim stating that "[p]rior to trial, the Court granted summary judgment to the United States on Plaintiffs' common law flowage easement claim." (App. 15). As to Modern's taking claim against St. Johns, the court concluded, without citation to authority, that "[t]he weirs and the filling-in of 500 feet of NS-1 . . . merely reestablished the status quo as it existed before Modern's unpermitted dredging and cannot themselves constitute the legal cause of any subsequent flooding." (App. 32-33).

On appeal, the Eleventh Circuit upheld the district court's judgment per curiam without opinion. (App. 1-2).

This petition seeks to have the Court review the Eleventh Circuit's: (i) rejection of Modern's inverse condemnation claim against St. Johns; and (ii) failure to fully adjudicate and effective rejection of Modern's common law flowage easement claim against the United States.

REASONS FOR GRANTING THE PETITION

The Eleventh Circuit's decision directly conflicts with this Court's decision in *Loretto v. Teleprompter*, 458 U.S. 419 (1982) and its circuit court of appeal and Florida Supreme Court progeny. These cases all hold that permanent, governmentally authorized or compelled physical occupation of an owner's property, however minimal, constitutes a *per se* "taking" of property for which compensation is due under either the Florida or Federal constitutions.

The Eleventh Circuit's decision also erroneously fails to determine, pursuant to 28 U.S.C. § 2409a, the existence, location, extent and scope of the common law flowage easement appurtenant to Modern's property that would otherwise allow Modern to drain its property by canals and to maintain such canals to prevent the flooding of its property.

The legal effect of the Eleventh Circuit's decision is to judicially take Modern's land and common law flowage easement rights.

I.

The Eleventh Circuit's Decision Directly Conflicts With This Court's Decision In *Loretto v. Teleprompter Manhattan CATV Corp.*, Various Circuit Courts Of Appeals' Decisions And The Florida Supreme Court's Decision In *Storer Cable T.V. of Florida, Inc. v. Summerwinds Apartments, Ltd., et al.*

The Eleventh Circuit's decision directly conflicts with the United States Supreme Court's decision in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) and with various circuit court of appeals decisions and the Florida Supreme Court's decision in *Storer Cable T.V. of Florida, Inc. v. Summerwinds Apartments, Associates, Ltd., et al.*, 493 So. 2d 417 (Fla. 1986) which adopt and apply *Loretto*. These cases hold that a governmental requirement that a landowner involuntarily acquiesce in the continued physical invasion of his or her

property by foreign physical forces, however minimal, constitutes a *per se* taking requiring compensation. Sup. Ct. R. 10(a), 10(c).

A. Relevant Background Principles Of Florida Property And Nuisance Law

Upon statehood in 1845, Florida adopted the English common law. Fla. Stat. § 2.01. It recognized that flooding resulting from failure to maintain a drainage ditch constituted an actionable nuisance abatable by immediate self-help.[7] At common law, disputes involving interference with drainage of surface waters were resolved by one of two doctrines: the common enemy rule or the civil law rule. The civil law rule provides that the higher elevation tracts have an easement or servitude over the lower tracts for surface waters to drain in their natural manner. The common enemy rule gave landowners an unlimited privilege to deal with surface waters on

---

[7] As stated by Sir William Blackstone, "[s]o if my neighbor ought to scour a ditch, and does not, whereby my lands is overflowed, this is an actionable nuisance" and " . . . such nuisance may be abated, that is, taken away or removed by the party aggrieved thereby . . . " Sir William Blackstone, *Commentaries on the Laws of England*, Bk. III, ch. 13 at 217, ch. 1 at 5 (Thomas M. Cooley ed., 3rd Ed. Rev. 1884). According to Blackstone " . . . [t]he reason why the law allows this private and summary method of doing one's self justice is because injuries of this kind, which obstruct or annoy such things as are of daily convenience and use, require an immediate remedy, and cannot wait for the slow progress of ordinary forms of justice." *Id.* at Bk. III, ch. 1, p.5.

their land as they pleased without regard to the harm that may be caused to others. Frank E. Maloney, Shelden J. Plager & Fletcher N. Baldwin, *Water Law and Administration: The Florida Experience*, 201-204 (1968). The practical necessity for improvement and development of land led most jurisdictions following the civil rule, including Florida, to modify the rule to allow the upper owner to enhance the drainage of his property. *Id.* at 202.

These drainage rights are of particular practical importance in Florida, a state characterized by vast expanses of swamps, wetlands and flood-prone uplands that have been previously reclaimed by ditching, diking and draining. They are also deeply embedded in Florida history. Once Florida became a state, the Florida and Federal governments immediately recognized the need for and pursued a public policy that fostered conversion, drainage, reclamation, and development of wetlands. Pursuant to the Swamp Lands Act of 1850, the State of Florida would eventually receive patents from the Federal government conveying a total of 20.4 million acres of "Swamp and Overflowed" lands – nearly two-thirds of all the land in Florida – for the purpose of facilitating their sale, conversion, reclamation and development. See, *Everglades Sugar & Land Co. v. Bryan*, 87 So. 68, 73 (1921). Additionally, the Florida Legislature passed numerous laws that fostered such conversion,

drainage, reclamation, and development of wetlands during the 19th and 20th centuries.[8]

During this same period, Florida courts would develop a modified version of the civil rule establishing a common law flowage easement that included "the right [of the dominant estate] by ditches and drains, to drain his own land into the natural and usual channels even though the quantity cast upon the servient estate is greatly increased." *Edason v. Denison*, 194 So. 342 (Fla. 1940); Maloney and Plager at 206-207; *Brumley v. Dorner*, 83 So. 912, 914 (Fla. 1919); *Libby v. Roberts*, 110 So. 82 (Fla. 1959); *Pearce v. Pearce*, 97 So. 2d 329 (Fla. Dist. Ct. App. 2d Dist. 1957). The Florida Fifth District Court of Appeal in *Seminole County v. Mertz*, 415 So. 2d at 1289, 1286

---

[8] For example, Article XI, section 2 of the first Florida Constitution expressly required the government of Florida to encourage and provide for a liberal system of internal improvements, including drainage canals. Art. XI, § 2, Fla. Const. (1838). Also see, ch. 610, Fla. Laws (1854) (currently codified at § 253.001, Fla. Stat. (2009)) (creating Internal Improvement Fund to facilitate drainage and conversion of those lands the federal government conveyed to the State of Florida under the Swamp Lands Act); Ch. 4178, Fla. Laws (1893) (ditch and drain laws to control and impound excess flows by authorizing counties to "build drains, ditches or watercourses upon the petition of two or more landowners"); Ch. 5035, Fla. Laws 188 (1901) (authorizing counties to reclaim lands to benefit agriculture and public health); Ch. 6458, Fla. Laws 184, 184-86 (1913) (authorizing creation of drainage districts to facilitate the drainage and conversion of private lands by the landowners).

(Fla. Dist. Ct. App. 5th Dist. 1964), summarized the law this way:

> Florida courts have, in an almost unbroken line of decisions, adopted practically all the elements of a modified civil law rule of surface waters by which the upper owner may improve and enhance the natural drainage of his land as long as he acts reasonably and does not divert the flow, and that the lower owner is subject to an easement for such flow as the upper owner is allowed to cast upon him.

In this case, the developer of the Titusville Fruit and Farmlands Subdivision and its successors constructed the drainage canal system in the exercise of these proprietary rights so as to generally follow the natural drainage. Under Florida law, their successors, including Modern: (i) had a right to rely upon the drainage pattern as established by the original design specifications of the drainage canal system, *Drake v. Walton County*, 6 So. 3d 717, 720 (Fla. Dist. Ct. App. 1st Dist. 2009); and (ii) acquired these common law flowage easement rights in the canal system together with a right, described as "too elementary to require citation to authorities," to maintain it when the need arises. *Fleming v. State Road Dept.*, 25 So. 2d 376, 379 (Fla. 1946).[9]

---

[9] Also see, *Lamb v. Dade County*, 159 So. 2d 477, 479-80 (Fla. Dist. Ct. App. 3d Dist. 1964) (landowner has right to enter on private property upon which drainage canal located in order

(Continued on following page)

At its core, a common law flowage easement is one's right to remain undisturbed in the possession of, and to protect one's property by excluding floodwaters from one's property. These rights are among the most essential sticks in the bundle that comprise property. They are expressly recognized by Article I, section 2 of the Florida Constitution (1968) which provides that "all natural persons . . . have inalienable rights, among which are the rights to . . . acquire, ***possess and protect*** property." According to the Florida Supreme Court, these inalienable rights to possess and protect property are fundamental, and paramount, not subordinate, to the State's police powers. *Corn v. State*, 332 So. 2d 4, 7 (Fla. 1976). The importance of these rights is legislatively recognized by section 298.66, Florida Statutes (2008), which imposes civil and criminal liability upon any person who "willfully or otherwise obstruct[s] any canal, drain, ditch or any drainage works constructed by any district."

---

to clean out and maintain canal, and ownership of canal does not vest owner with legal right to obstruct or cutoff flow unreasonably); see also, *Stoll v. MacPherson Duck Club, Ltd.*, 607 P. 2d 1019, 1022 (Colo. Ct. App. 1979) (holding under civil law rule that where ditch follows natural drainage, person using ditch has legal and natural easement over lands of lower owner for drainage of surface waters and a property right in the ditch together with the right to maintain it, including the right to enter upon servient estate for such purposes when the necessity arises).

Consistent with the paramount fundamental character of these proprietary drainage rights, recurrent flooding is recognized under Florida law as both a continuing trespass and nuisance, which under the law of self-help, is immediately abatable, and which, under the law of servitudes, may ripen into a taking of an easement, requiring compensation. *Seaboard All Florida Ry. Co. v. Underhill*, 141 So. 409, 412 (Fla. 1932); *Wetzel v. A. Duda & Sons*, 306 So. 2d 533, 534 (Fla. Dist. Ct. App. 4th Dist. 1975); also see, RESTATEMENT (SECOND) OF TORTS § 201 (1965) (recognizing privilege of entry upon land in possession of another to abate a private nuisance); *Town of Miami Springs v. Lawrence*, 102 So. 2d 143, 146 (Fla. 1953); *City of Jacksonville v. Schumann*, 167 So. 2d 95, 99-100, 102-03 (Fla. Dist. Ct. App. 1st Dist. 1964), *cert. denied*, 172 So. 2d 597 (Fla. 1964); *Associates of Meadow Lake, Inc. v. City of Edgewater*, 706 So. 2d 50, 51 (Fla. Dist. Ct. App. 5th Dist. 1998) (Substantial periodic flooding, coupled with a likelihood of recurrence, held to constitute a taking.)

In sum, the ability of Florida landowners to immediately abate the flooding of their property is essential to the use, enjoyment and protection of millions of acres of privately owned previously drained Florida land and is legally recognized and protected under the Florida Constitution, Florida Statutes and Florida nuisance and property law.

B. The Eleventh Circuit's Decision Directly Conflicts With *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982)

In *Loretto*, the property owner purchased a five-story apartment building in 1971. The previous owner had granted permission to a local cable television company to install cable equipment on the building and the equipment was installed prior to Ms. Loretto's acquisition of the building. In 1973, the City of New York enacted regulations prohibiting a landlord from "interfer[ing] with the installation of cable television facilities upon his property or premises." 458 U.S. at 423. After discovering the existence of the cable, Ms. Loretto brought a class action suit against the cable company and the City alleging that the cable installation was a trespass and, insofar as it relied upon the City's regulation, a taking without just compensation by the City. *Id.* at 424. The trial court upheld the constitutionality of the regulations. The New York Court of Appeals, over dissent, also upheld the regulations, rejecting the argument that a physical occupation authorized by the government is necessarily a taking. *Id.* at 424-25. This Court reversed, concluding that "a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve." *Id.* at 426. In reaching its conclusion, this Court stated that:

> . . . we have long considered a physical intrusion by government to be a property restriction of an unusually serious character

> for purposes of the Takings Clause. Our cases further establish that when the physical intrusion reaches the extreme form of a permanent physical occupation, a taking has occurred. In such cases, the character of the governmental action not only is an important factor in resolving whether the action works a taking but also is determinative.

Id. Citing its decision in *Pumpelly v. Green Bay Co.*, 13 Wall. (80 U.S.) 166 (1871), involving governmentally authorized flooding of property, as the quintessential example of such taking, this Court stated:

> When faced with a constitutional challenge to a permanent physical occupation of real property, this Court has invariably found a taking. As early as 1872, in *Pumpelly v. Green Bay Co.*, 13 Wall. (80 U.S.) 166, 20 L.Ed. 557, this Court held that the defendant's construction, pursuant to state authority, of a dam which permanently flooded plaintiff's property constituted a taking. A unanimous Court stated, without qualification, that "where real estate is actually invaded by superinduced additions of water, earth, sand, or other material, or by having any artificial structure placed on it, so as to effectually destroy or impair its usefulness, it is a taking, within the meaning of the Constitution." *Id.*, 13 Wall. (80 U.S.) at 181.

Id. at 427 (footnote omitted). This Court justified its rule based upon the unusually serious form of invasion of an owner's property rights "to possess, use and dispose of [property]," each of which are effectively destroyed to the extent the government permanently occupies physical property. *Id.* at 435.

C. The District Court's Findings Affirmed By The Eleventh Circuit Establish A *Per Se* Taking Under *Loretto* And Its Progeny

The record below, including the district court's findings, establish beyond meaningful dispute that: (i) Modern's property is being permanently flooded by superinduced additions of water, primarily from the City of Titusville, that reach Modern's property through the drainage canal system (App. 4-5, 7, 28-29, 41, 143-49, 150-54, 155-67, 203-07); (ii) the primary cause of the flooding is the weirs and blockages in EW-1 and NS-1 located on and in the platted right-of-way immediately adjacent to Modern's property (App. 32, 35); (iii) Modern removed the blockages thereby effectively abating the flooding (App. 11, 35 & 35, n. 27); (iv) St. Johns, exercising its regulatory authority under chapter 373, Florida Statutes, either authorized or required restoration of the blockages (App. 11-13); and (v) as a result of such restoration, Modern's property continues to flood on a permanent, regularly recurring basis. (App. 28-29, 143-49, 150-54).

St. Johns' regulatory actions have effectively worked a taking under *Loretto* and its progeny by

prohibiting Modern from immediately abating the continued physical intrusion and occupation of its property by floodwaters. St. Johns' actions are constitutionally indistinguishable from those found to work a taking in *Loretto*. In both instances, government interfered with a landowner's ability to remove or abate a pre-existing physical invasion of its property by outside foreign forces.

The practical effect of St. Johns' actions is to impose an easement for flooding of Modern's property. See, *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) (imposition of an easement authorizing public access to beach across landowner's property as condition of permit authorized taking by physical invasion). Under *Loretto* and its progeny, "a permanent physical occupation does not necessarily mean a taking of unlimited duration." *Skip Kirchdorfer, Inc. v. United States*, 6 F. 3d 1573, 1582 (Fed. Cir. 1993). For a physical invasion to be deemed "permanent," it "need not be continuous and uninterrupted . . . [a]n intermittent intrusion still causes a taking."[10] *Id.* at 1582-83.

As stated by the Federal Circuit in *Hendler v. United States*, 952 F. 2d 1364, 1377 (Fed. Cir. 1991):

---

[10] Also see, *Kaiser Aetna v. United States*, 444 U.S. 164 (1979) (regulatory imposition of a navigational servitude authorizing public access of a private marina as a condition of a federal dredge and fill permit was taking of easement of passage though such passage was intermittent).

> If the term "temporary" has any real world reference in takings jurisprudence, it logically refers to those governmental activities which involve an occupation that is transient and relatively inconsequential . . . [A] truck driver parking on someone's vacant land to eat lunch is an example.

952 F. 2d at 1377.

Thus, while such easement may prove to be temporary should Modern apply for and St. Johns issue a permit to remove the restored blockages, the fact remains that, until then, Modern is compelled by St. Johns to suffer the continued physical invasion of its property by floodwaters that Modern has the private proprietary right to immediately rid itself of. The physical invasion of Modern's property is hardly transient and certainly not inconsequential. The property is being flooded continuously for months during which time it is useless even for camping. The fact that St. Johns' regulatory scheme requires a permit and that such permit might be issued does not obviate, and, therefore, provides no defense to a *Loretto*-type physical invasion taking.[11] See, *Boise*

---

[11] In support of its permit defense, St. Johns presented evidence at the trial of a complicated, costly hydraulic "work-around". It required extensive reconstruction and deepening of NS-1 and the IRCC, replacement of numerous culverts along a nearly 2 mile stretch of the IRCC, and construction of a new berm along the entire length of the Refuge's boundary along NS-1 and the IRCC. Most of the improvements would be on the Refuge, and would require substantial wetland impact

(Continued on following page)

Cascade Corp. v. U.S., 296 F. 3d 1339, 1345-46 (Fed. Cir. 2002) (permit requirement not a defense to a taking claim under *U.S. v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985) where government allegedly takes easement or physically occupies land); also see *Azul Pacifico, Inc., v. City of Los Angeles,* 948 F. 2d 575, 578 (9th Cir. 1991) (when alleged taking occurs as result of physical invasion, the taking is ripe and landowner need not exhaust administrative remedies since the physical invasion is itself final government action); accord, *Greenfield Mills, Inc. v. Macklin*, 361 F. 3d 954, 958 (7th Cir. 2004).

The Eleventh Circuit's affirmance of the district court's conclusion that St. Johns' conduct could not constitute the legal cause of any subsequent flooding cannot be squared with the aforementioned cases or established proximate cause principles.

---

mitigation and entail great cost. St. Johns gave no indication below that such permit would be issued. Similarly, the United States made no commitment to consent to such "work around". Thus, even if the availability of a permit were a defense to a physical invasion taking, where the door is being left open for a permit, the landowner is not required to pursue such permit if no reasonable person would do so. *Hage v. United States*, 35 Fed. Cl. 147, 164 (Fed. Cl. 1996). Under the aforementioned circumstances, no reasonable person would undertake such a work-around because it is too costly and speculative, particularly where, as here, both the United States and St. Johns deny that Modern has any rights to either make or maintain the very drainage improvements that would have to be constructed and maintained under such permit in order to abate the flooding of Modern's property.

Causation in takings cases closely follows tort proximate cause principles. This is because, as Professor Epstein notes, "[b]y the central premise of representative government . . . [tort proximate cause] rules apply when government stands in the shoes of a private defendant [in a takings case]." Richard A. Epstein, *Takings Private Property and the Power of Eminent Domain*, 47-48 (1985); *Ridgeline, Inc. v. U.S.*, 346 F. 3d 1346, 1355 (Fed. Cir. 2003) ("a taking . . . results when . . . the asserted invasion is the 'direct natural or probable result of an authorized activity' . . . ").

Under Florida law, a party's act may be the legal cause of injury even though it operates in combination with the preceding acts of another or some natural cause and even though such acts or natural cause later conjoins with the subsequent acts of another. *Zigman v. Cline*, 664 So. 2d 968, 970 (Fla. Dist. Ct. App. 4th Dist. 1995); *Hart v. Stern*, 824 So. 2d 927, 936 (Fla. Dist. Ct. App. 5th Dist. 2002). Specifically, in the flooding context, courts in other jurisdictions have held that interference with the ability to abate flooding by a private defendant that results in injuries is actionable in tort on the theory that, even though the initial obstruction was not chargeable to the defendant, the defendant's interference with the abatement of the flooding was just as injurious to the plaintiff as if the defendant caused the obstruction in the first place.[12] In the case of

---

[12] For example, in *Parrish v. Parrish*, 94 S.E. 315 (Ga. Ct. App. 1917), two trees on the defendant's land had been blown

(Continued on following page)

constitutional torts under 42 U.S.C. § 1983, causation is established when government action is the "moving force" behind the alleged constitutional violation. *Monell v. New York City Dept. of Social Servs.*, 436 U.S. 658, 694 (1978). Consistent with these theories of causation, this Court found a *per se* taking in *Loretto* despite the fact that: (i) the City, itself, had not installed the cable equipment; (ii) installation of the cable equipment had been authorized by Ms. Loretto's predecessor and completed such that the physical invasion existed at the time Ms. Loretto acquired the apartment building; and (iii) the City's

---

over by high winds and had fallen across a stream, forming a barrier that gradually obstructed the natural flow of the water. *Id.* at 315. The plaintiff, who owned the adjoining land upstream, asked that the trees be removed, but the defendant refused either to remove them or to allow the plaintiff to do so. *Id.* A heavy rain fell and resulted in the plaintiff's land being flooded. *Id.* The Georgia Court of Appeals held that a cause of action existed, upon the theory that even though the original obstruction was not chargeable to the defendant his subsequent conduct amounted to a tortious maintenance of the condition. *Id.* at 315-17. The Arkansas Supreme Court citing *Parrish* and sections 326 and 497 of the Restatement of Torts, adopted this line of reasoning in *Leek v. Brasfield*, 290 S.W. 2d 632, 634 (Ark. 1956). There some unknown person cut an upstream dam which protected the plaintiff's farm from flooding. *Id.* at 633. The defendant, who benefitted from the cut because it allowed escape of floodwater that would otherwise impound on his property, threatened to sue the contractor hired to repair the dam. *Id.* As a result, the contractor failed to repair the dam, exposing the plaintiff's farm to flooding. *Id.* Reasoning that the act of preventing the repair was just as injurious to the plaintiff as the cutting of it, the Court concluded that the defendant's interference with the repairs was actionable. *Id.* at 633-34.

regulation merely required maintenance of the status quo condition by prohibiting interference with the pre-existing cable installation. Indeed, citing *Pumpelly*, this Court squarely rejected the argument adopted by the district court and affirmed by the Eleventh Circuit in this case that the government could not be liable because it did not itself cause the pre-existing physical invasion:

> A permanent physical occupation authorized by state law is a taking without regard to whether the State, or instead a party authorized by the State, is the occupant.

Id. at 432, n. 9.

In short, under *Loretto,* the fact that the flooding pre-existed Modern's acquisition of title and that St. Johns itself did not cause the pre-existing flooding, but instead merely required the reflooding of Modern's property, does not absolve St. Johns of liability for its interference with Modern's ability to abate the flooding. This is because the characteristic of the government action that makes it a *per se* taking under *Loretto* is, according to this Court, *the requirement* that the landowner acquiesce, involuntarily, in the continued physical invasion of his or her property by foreign physical forces. See, *F.C.C. v. Florida Power Corporation, et al.,* 480 U.S. 245, 252 (1987); *Pinewood Estates of Michigan, et al. v. Barnegat Township Leveling Board*, 898 F. 2d 347, 352 (3rd Cir. 1990).

Here, St. Johns interfered with Modern's ability to exclude floodwaters thereby requiring Modern to

suffer the continued physical invasion of its property by these floodwaters. Under *Loretto* and its progeny, this conduct constituted a *per se* taking to the extent of such flooding under both the Federal and Florida Constitutions.

Modern consistently claimed a *Loretto*-type taking below. Yet, despite its clear relevance, both the district court and the Eleventh Circuit disregarded *Loretto* and effectively disposed of Modern's taking claim against St. Johns in one sentence, without citation to authority, based on non-existent principles of state substantive law. This summary treatment of Modern's core individual constitutional rights flies in the face of established Florida proximate causation principles and *Loretto, Storer Cable T.V.* and various circuit courts of appeals decisions. It calls out for this Court's review.

D. The Eleventh Circuit's Decision Directly Conflicts With Its Own Prior Precedent And That Of Various Other Circuit Courts of Appeals

Various circuit courts of appeals have expressly adopted and applied *Loretto*.[13] The Eleventh Circuit,

---

[13] *Nixon v. U.S.*, 978 F. 2d 1269 (D.C. Cir. 1992); *Hall v. City of Santa Barbara*, 833 F. 2d 1270 (9th Cir. 1987); *Azul Pacifico, Inc., v. City of Los Angeles*, 948 F. 2d 575 (9th Cir. 1991); *Skip Kirchdorfer, Inc. v. United States*, 6 F. 3d 1573, 1582 (Fed. Cir. 1993); *Hendler v. United States*, 952 F. 2d 1364, 1376 (Fed. Cir. 1991); *Pinewood Estates of Michigan, et al., v. Barnegat Township Leveling Board*, 898 F. 2d 347 (3rd Cir. 1990); *Cable*

(Continued on following page)

in particular, expressly adopted and applied *Loretto* in *Gulf Power Co. v. U.S.*, 187 F. 3d 1324, 1328-31 (11th Cir. 1999) (holding that federal Pole Attachment Act, requiring electric utilities to provide access to their poles, ducts and conduits to cable television systems and telecommunications carriers, amounted to a *per se* taking under *Loretto*). The Eleventh Circuit's decision conflicts with these cases.

E. The Eleventh Circuit's Decision Directly Conflicts With The Florida Supreme Court Decision In *Storer Cable T.V. of Florida, Inc. v. Summerwinds Apartments Associations, Ltd.*

The Florida Supreme Court in *Storer Cable T.V. of Florida, Inc. v. Summerwinds Apartments, Associates, Ltd., et al.*, 493 So. 2d 417 (Fla. 1986) expressly held, based on *Loretto*, that section 83.66, Florida Statutes (Supp. 1982), prohibiting landlords from denying cable access to tenants, was unconstitutional under both the Federal and Florida Constitutions. The Eleventh Circuit's decision conflicts with the highest Florida Court's adoption of *Loretto*.

Holdings of Georgia, Inc. v. McNeil Real Estate Fund VI, Ltd., et al., 953 F. 2d 600 (11th Cir. 1992); *Gulf Power Co. v. U.S.*, 187 F. 3d 1324 (11th Cir. 1999); *Ridgeline, Inc. v. U.S.*, 346 F. 3d 1346 (Fed. Cir. 2003); *Greenfield Mills, Inc. v. Macklin*, 361 F. 3d 954, 958 (7th Cir. 2004).

II.

This Court's Review Is Necessary To Address Modern's Reserved Federal Taking Claims Which May Otherwise Be Barred By Florida Issue Preclusion Principles Under *San Remo Hotel, L.P. v. City & County of San Francisco, California*

Modern reserved its federal takings claims under *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411, 421-22 (1964) and *Jennings v. Caddo Parish School Board*, 531 F. 2d 1331 (5th Cir. 1976). (App. 218-19). However, given that Florida physical invasion takings law is coextensive with federal takings law,[14] state issue preclusion principles may well bar Modern from bringing its reserved federal taking claims in federal court. See, *San Remo Hotel, L.P. v. City & County of San Francisco, California*, 545 U.S. 323, 330-48 (2005); see also, *Agripost, LLC, v. Miami-Dade County, Florida*, 525 F. 3d 1049 (11th Cir. 2008) (applying Florida issue preclusion principles to bar subsequent federal takings claims in federal court under *San Remo*).

To the extent the district court's and the Eleventh Circuit's decisions can be viewed as squarely addressing Modern's physical invasion taking claim against St. Johns under the Florida

---

[14] See, *Keshbro, Inc. v. City of Miami*, 805 So. 2d 864, 869-72 (Fla. 2001) (expressly adopting this Court's current analytical framework for deciding regulatory takings).

takings clause, the need for this Court's review is particularly compelling since it may be Modern's only opportunity to obtain judicial determination of its reserved federal takings claims under *Loretto*. Sup. Ct. R. 10(c).

III.

The Eleventh Circuit's Affirmance Of The District Court's Confusing And Incomplete Rulings Effectively Rejecting Petitioner's Common Law Flowage Easement Claim Against The United States Under The Federal Quiet Title Act, 28 U.S.C. § 2409 Constitutes Reversible Error

Effective drainage of Modern's property depends on its ability to use and maintain portions of EW-1, NS-1 and the IRCC which traverse the Refuge. No party disputes that Modern's property enjoys an appurtenant common law flowage easement under Florida law. The dispute centers on the location, extent and scope of this easement. Clearly, these disputed issues were worthy of serious judicial consideration. Nevertheless, in entering final judgment against Modern, the district court simply cited, without further explanation, its earlier summary judgment ruling. This ruling only determined the issue of whether the United States had interfered with any such easement. (App. 57-58). The entirely separate question of the existence, location, scope and extent of Modern's common law flowage easement was not adjudicated leaving Modern

completely in doubt as to its common law flowage easement rights in the drainage canals necessary to drain its property. The failure of a lower federal court to address all properly raised issues of constitutional dimension warrants this Court's review. *Blackburn v. State of Alabama*, 354 U.S. 393 (1957); *Ridgeline, Inc. v. U.S.*, 346 F. 3d 1346, 1352, 1354 (Fed. Cir. 2003) (federal claims court's failure to address properly presented *Loretto*-type claim of flowage easement taking constituted reversible error). Sup. Ct. R. 10(a), 10(c).

IV.

The Eleventh Circuit's Affirmance Of The District Court's Judgment Directly Conflicts With This Court's Decision In *Palazzolo v. Rhode Island, et al.*, And Amounts To A Judicial Taking

The practical effect of the Eleventh Circuit's affirmance is, from Modern's perspective, the equivalent of converting Modern's drainage rights and land into public property. Such outcome directly conflicts with this Court's decision in *Palazzolo v. Rhode Island, et al.*, 533 U.S. 606, 626-28 (2001) and amounts to a judicial taking. Sup. Ct. R. 10(a), 10(c).

St. Johns could not have deprived Modern's predecessors of an easement for flooding without compensating them. Therefore, in conveying the property to Modern, Modern's predecessor must be understood to have transferred its full property rights, including its common law flowage easement

rights in the drainage canal system. *Id.* at 629. *Palazollo* prohibits the executive and legislative branches from working a critical alteration of the nature of property that transforms private property into public property without compensation. Also see, *Webbs Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980). The Eleventh Circuit's affirmance of the district court's judgment essentially redefined and, thereby took, by judicial decree, not only Modern's appurtenant common law flowage easement rights in the drainage canal system, but also Modern's land.

While this Court has not formally decided the question of whether a judicial departure from established principles of property law may constitute a taking or violate an owner's due process rights, there appears to be no principled reason why it could not be.[15] And, indeed, this Court has, on various occasions, acknowledged that judicial decisions, like actions of the executive and legislative branches, can violate a person's constitutional rights. *Stevens v. City of Cannon Beach*, 510 U.S. 1207, 114 S.Ct. 1332, 1334 (1994) (Scalia, J., dissenting) ("No more by judicial decree than by legislative fiat may a State transform private property into public property without compensation . . . by invoking non-existent rules of

---

[15] The judicial taking question is presently pending before this Court in another case arising in Florida. *Walton County v. Stop the Beach Renourishment, Inc.*, 998 So. 2d 1102 (Fla. 2008), *cert. granted*, 2009 WL 688854 (U.S. Fla., June 15, 2009) (No. 08-1151, 2009 Term).

state substantive law."); *Hughes v. Washington*, 389 U.S. 290, 296-97 (1967) (Stewart, J., concurring) ("[A] State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all"); *Webbs Fabulous Pharmacies v. Beckwith*, 449 U.S. 155, 164 (1980) (neither Florida Legislature by statute, nor Florida courts by judicial decree may by *ipse dixit* transform private property into public property without compensation); *Chicago Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226, 241 (1897) (appellate court affirmance of state court judgment whereby private property is taken for public use is denial of due process required by the Fourteenth Amendment to the United States Constitution).

As one commentator presciently noted:

> [c]ourts have the doctrinal tools to undertake many of the actions that legislatures and executive agencies are constitutionally barred from pursuing under the takings protections – and pressure is mounting for courts to use these tools. Indeed, while paying lip service to stare decisis, the courts on numerous occasions have reshaped property law in ways that sharply constrict previously recognized private interests. Faced by growing environmental, conservationist, and recreational demands, for example, state courts have recently begun redefining a variety of property interests to

> increase public or governmental rights, concomitantly shrinking the sphere of private dominion.

Barton H. Thompson, Jr., *Judicial Takings*, 76 Va. L. Rev. 1449, 1451 (1990).

Here the Eleventh Circuit affirmed the district court's judgment that effectively redefined Modern's well-established common law flowage easement rights and invoked non-existent rules of legal causation under Florida law to reject Modern's *Loretto*-type taking claim. The Eleventh Circuit's decision conflicts with the Ninth Circuit's decision in *Robinson v. Ariyoshi*, 753 F. 2d 1468, 1474 (9th Cir. 1985), *rev'd on procedural grounds*, 477 U.S. 902 (1986) (plaintiff landowners could not be deprived of vested property rights retroactively by judicial decree absent payment of compensation).

This Court's review is necessary to prevent St. Johns, the district court and the Eleventh Circuit from transforming Modern's property into public property without compensation.

CONCLUSION

As stated by this Court, the purpose of the takings clause is to prevent the government from "forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). The Eleventh Circuit's

affirmance of the district court's judgment ignores the bright line takings mandate established by *Loretto* and its progeny. For all practical purposes, it enables St. Johns to require Modern to dedicate its property as a large drainage pond for common use for the benefit of the residents of the City of Titusville and the St. Johns National Wildlife Refuge. Since St. Johns' statutory authority under chapter 373, Florida Statutes, must yield to Article X, section 6 of the Florida Constitution and the Fifth Amendment to the United States Constitution, such an outcome is only constitutionally permissible upon payment of just compensation for a taking.

Under Florida law, Modern enjoys a common law flowage easement which inheres in the portions of the drainage canal system necessary to drain its property. Modern has a right to rely upon that drainage system and its continued ability to maintain it. The Eleventh Circuit's decision leaves Modern in a legal Catch-22. It is burdened with the common law obligation to immediately receive floodwaters from upstream owners, but it does not enjoy the benefit of a reciprocal right to either immediately discharge the same floodwaters onto downstream owners or, alternatively, if St. Johns elects not to honor such right, to recover compensation for the taking of its property by these floodwaters.

Review by this Court is necessary to remedy this legal Catch-22 and to enforce *Loretto's* narrow, but unqualified constitutional mandate.

Respectfully submitted

*DAVID SMOLKER
*Counsel of Record
ETHAN J. LOEB
MATHEW C. LUCAS
BRICKLEMYER SMOLKER & BOLVES, P.A.
500 E. Kennedy Blvd., Suite 200
Tampa, Florida 33602
813-223-3888
Attorneys for Petitioners

July 16, 2009

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 08-11799

D. C. Docket No. 03-00718-CV-ORL-31-KRS

MODERN, INC., a Florida corporation, FIRST OMNI SERVICE CORP., a Florida corporation, Plaintiffs-Appellants

versus

STATE OF FLORIDA, UNITED STATES OF AMERICA, DEPARTMENT OF TRANSPORTATION, Defendants-Appellees,

versus

ST. JOHNS RIVER WATER MANAGEMENT DISTRICT, Defendant-Third-Party-Plaintiff-Appellee,

versus

BREVARD COUNTY, et al., Third-Party-Defendants.

Appeal from the United States District Court
for the Middle District of Florida

(January 21, 2009)

Before HULL, WILSON and HILL, Circuit Judges.

PER CURIAM:

After review and oral argument, we conclude that Appellants Modern, Inc. and First Omni Service Corp. have not shown reversible error in the district court's January 28, 2008 order, which was entered after a three-week bench trial and which grants final judgment in favor of the Appellees.

AFFIRMED.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

MODERN, INC., and FIRST OMNI SERVICE CORP.,

Plaintiffs,

-vs-

STATE OF FLORIDA, DEPARTMENT OF TRANSPORTATION, ST. JOHNS RIVER WATER MANAGEMENT DISTRICT, and UNITED STATES OF AMERICA,

Defendants.

Case No. 6:03-cv-718-Orl-31KRS

AMENDED MEMORANDUM OPINION[1]

(Filed Jan. 30, 2008)

The dusky seaside sparrow, *Ammodramus maritimus nigrescens,* was a native, non-migratory bird that lived in the salt marshes of Brevard County. Pollution, pesticides, and loss of habitat – caused by, among other things, drainage of marshes it used as nesting grounds – caused its numbers to decline. In 1967, the dusky was placed on the original federal list of endangered species. Shortly thereafter, the federal

[1] Amended to reflect proper signing date.

government began acquiring property and attempting to restore the dusky's habitat so as to save it from extinction.

Despite these efforts, the species continued its decline. By 1979, only six duskies were known to exist. The last known dusky seaside sparrow died, in captivity, in 1987, and the species was officially declared extinct in 1990

It has been said that no good deed goes unpunished. Consistent with this aphorism, the government's effort to save the dusky is the genesis of this protracted dispute.

I. Background

A. Titusville Fruit and the St. Johns River

In the early 1900s, a group of investors formed the Titusville Fruit and Farm Lands Company ("Titusville Fruit"). In 1911, the company drew up a plat for a 12,800-acre subdivision (the "Titusville Fruit Tract") in the flood plain of the St. Johns River in North Brevard County. The plat was recorded in the public records of Brevard County 1914. (Doc. 70 at 4). The platted tract was roughly rectangular, approximately five miles east to west and four miles north to south. By reference to modern-day landmarks, it stretched from near Titusville west almost to the St. Johns River, and from about a mile south of

State Road 50 to about a mile north of Satterfield Road.[2]

The Titusville Fruit Tract consisted largely of flat marshland. The natural surface flow (or "sheet flow") of water across the tract was generally from the northeast to the southwest, toward the river. To improve drainage and allow as much as possible of the tract to be farmed, Titusville Fruit built a network of intersecting north-south and east-west drainage canals and ditches (the "Drainage System") throughout most of the tract. Based on contemporary newspaper articles and old surveys, the construction of the Drainage System began around 1911 and continued at least through 1919.[3] (Tr. 360). The canals ran along the borders and down the centers of most of the one-square-mile sections that had been laid out on the plat, running through areas that had been designated for roads. (Tr. 365).[4]

---

[2] A map of the area is attached to this opinion.

[3] The Plaintiffs contend that construction of the Drainage System was "essentially complete" by 1914, but the Plaintiffs' expert testified that construction continued until 1919. (Tr. 360-61). Although the testimony suggested that some if not all of the construction after 1914 consisted of expansion of canals dug previously, the fact of such expansion suggests the system was not "complete." If the system had been functioning as intended, expanding the canals would have been unnecessary. Aerial photographs show that some canals were being enlarged as late as the period between 1943 and 1951. (Tr. 375-76).

[4] Although many additional canals exist on the tract or did in the past, only a handful are pertinent to the instant dispute:

(Continued on following page)

State Road 50 – then known as Old Cheney Highway – was completed across the Titusville Fruit Tract in the 1920s. Interstate 95, which bisects the old Titusville Fruit Tract from north to south, about one-quarter of the way in from its eastern edge, was built in the mid-1960s. (Tr. 394). Culverts were placed to allow existing canals to flow westerly beneath the interstate. Hacienda Road, which runs from Highway 50 to Satterfield Road about a quarter of the way in from the western edge of the old Titusville Fruit Tract, was also built in the 1960s. (Tr. 394). As was the case with Interstate 95, culverts were installed beneath Hacienda Road where the newly built road intersected with existing canals. (Tr. 395).

Of the east-west canals, there is EW1, which runs about a half mile north of State Road 50, EW1.5, which parallels EW1 a half mile farther north, EW2 or the Satterfield Canal, which parallels EW1.5 a half mile to the north along the south side of Satterfield Road, the Indian River City Canal ("IRCC"), which runs along the north side of State Road 50, and the Addison Canal, which runs along the south edge of the eastern half of the plotted tract before veering southwest to connect directly to the St. Johns. (The IRCC was built after most of the canals at issue in this case, sometime between 1943 and 1951. (Tr. 376)). Historically, the east-west canals all extended from east of what is now Interstate 95 to some distance west of Hacienda Road, where they stopped before reaching the St. Johns River. Of the north-south canals, the most relevant are NS1, which runs from the southerly Satterfield Canal to the Addison Canal about a quarter mile west of Interstate 95; NS2, which does the same one half mile further west; and the ditch that runs along the east side of Hacienda Road.

In 1971, as part of its effort to save the dusky seaside sparrow, the United States established the St. Johns National Wildlife Refuge (the "Refuge"), acquiring the property by purchase or condemnation.[5] All but the westernmost portion of the Refuge consists of land that had been part of the old Titusville Fruit Tract. Generally speaking, the Refuge extends north from State Road 50 to Satterfield Road and west from Interstate 95 about 3.5 miles toward the St. Johns River. An additional 225 acres of the Refuge lie north of Satterfield Road. About 100 acres of what would otherwise be the southeast corner of the Refuge are in private hands. The Refuge occupies a substantial portion – approximately 45 percent – of the old Titusville Fruit Tract, and a substantial portion of the Drainage System (or its remnants) runs across it.

The dusky seaside sparrow's preferred habitat was what is referred to as an ephemeral salt marsh, an area temporarily flooded during the year and dominated by *Spartina* or cordgrass rather than the taller shrubs and trees that dominated drier portions of the Refuge. (Tr. 512). Shortly after the establishment of the Refuge, the United States Fish and Wildlife Service ("Fish & Wildlife") began trying to

---

[5] The Refuge consists of two non-adjacent parcels – the 4,200-acre Highway 50 Unit and the 2,000-acre Beeline Unit. (Doc. 329 at 11). The Beeline Unit lies far to the south of the properties at issue here and has no relevance to this case. Therefore, all references to "the Refuge" in this opinion should be understood to be references to the Highway 50 Unit only.

restore the property's natural sheet flow and hydroperiod.[6] (Tr. 551). Fish & Wildlife blocked the culverts under Hacienda Road with plywood (Tr. 541). Fish & Wildlife also plugged the east-west canals about every eighth of a mile west of Hacienda Road by bulldozing the spoil from off their banks down into the ditch. (Tr. 546).[7] These steps increased the amount of time water remained on the Refuge before it drained off toward the St. Johns River.

In the late 1980s, the Florida Department of Transportation ("FDOT") set out to expand State Road 50 from two lanes to four. Because the expansion resulted in loss of wetlands, FDOT was required to engage in mitigation to offset it. After negotiations involving a number of state and federal agencies, St. Johns issued a permit to FDOT for the mitigation project, which was performed by Fish & Wildlife with FDOT funding. The work was completed in 1991. The mitigation project involved two steps: completely filling the east-west canals west of Hacienda Road and replacing six existing 30-inch diameter culverts under Hacienda Road with nine 36-inch diameter culverts. The new culverts included "riser structures"

---

[6] The "hydroperiod" is the length of time water is present on the surface of a wetland.

[7] There is no evidence that Fish & Wildlife ever intentionally plugged or filled canals east of Hacienda Road. However, there was testimony that travel and other Fish & Wildlife activities on that portion of the Refuge, such as creating firebreaks, would sometimes result in part of the adjacent berm being inadvertently knocked into the canal.

– metal frames, attached to the culvert, into which one or more boards could be inserted to partially or completely dam the flow of water into the culvert. (Tr. 402-03). Refuge employees would insert one or more of the five-inch high riser boards to increase the water levels east of Hacienda Road. (Tr. 1797).

The Plaintiffs, Modern, Inc. ("Modern") and First Omni Service Corp ("First Omni"), are Florida corporations with their principal places of business in Brevard County. Modern is principally owned by Charles Moehle, who is also its president. His son, Michael, is president of and owns First Omni. Modern owns a parcel,[8] purchased in 1991 (Tr. 52) and tucked into what would otherwise be the southeast corner of the Refuge, adjacent to Interstate 95 and State Road 50. Modern's property is located south of the intersection of NS1 and EW1, with NS1 running along the western edge of the property and through the property itself for part of its length. First Omni owns a parcel on the east side of the Interstate and slightly

---

[8] The record is not clear as to the precise size of the properties owned by either Modern or First Omni. The Plaintiffs contend that they currently "possess deeds evidencing ownership of 132.5 acres" located in the northwest and northeast quadrants of the intersection of Interstate 95 and State Road 50. (Doc. 449 at 42). However, the Plaintiffs do not specify how much of this 132.5 acres is the Modern parcel, how much is the First Omni parcel, and how much, if any, is other property not involved in this matter. Although it does not affect the outcome, based on a review of the exhibits in this case the Court estimates that the Modern parcel that is the focus of this dispute comprises about 65 acres.

north, which it purchased in 1996. (Doc. 329 at 10).[9] Dr. William Dennis, the Plaintiffs' ecology and wetlands expert, testified that, in its natural state – i.e., without benefit of the Drainage System – a large majority of the Plaintiffs' property would be jurisdictional wetlands. (Tr. 1079).

In January 1996, Charles Moehle wrote a letter to St. Johns, complaining of flooding of the Plaintiffs' property. (Tr. 81). A series of negotiations ensued, involving the Plaintiffs, Fish & Wildlife, FDOT, St. Johns and Brevard County, among others. To try to alleviate the flooding, the County agreed to conduct some custodial dredging of the IRCC and to install a culvert in a road that had been constructed across the IRCC, blocking its flow. The County also agreed to perform some dredging on NS1 south of State Road 50. Sometime in 1997, Fish & Wildlife removed the riser boards that had been added to the culverts under Hacienda Road.[10]

---

[9] In the words of the Plaintiffs, "First Omni's property consists of a man-made pond created as a borrow pit." (Doc. 449 at 11). "Flooded" is the typical condition for a borrow pit, and First Omni did not produce any evidence that any of the Defendants were responsible for its flooded condition or that drainage easements are required for it to be utilized. Therefore, the remainder of this opinion will focus on the Modern parcel only.

[10] Refuge manager Ron Hight testified that, shortly before the trial, members of his staff noticed that two riser boards in one Hacienda Road culvert had apparently been missed when the others were removed in 1997. (Tr. 1795). Those boards were immediately removed. (Tr. 1795). There is no evidence that Fish

(Continued on following page)

In January 1997, Modern performed what it termed "maintenance" dredging of portions of EW1 and NS1 on and near its property. (Occlusion and vegetation growth had obstructed significant portions of these ditches, greatly reducing their capacity to drain Modern's property.) Essentially, EW1 was made wider and deeper from the intersection with NS1 a short distance to the east, and the same was done to NS1 from a short distance north of EW1 all the way south to State Road 50. Modern did not obtain a permit from St. Johns for the dredging.

By all accounts, the dredging was extremely effective, and NS1 began moving a tremendous volume of water off of Modern's property to the south. (Tr. 110). The dredging contractor, standing on the headwall of the culvert at NS1 and State Road 50, watched a 3- to 4-foot wall of water flow down NS1 and hit the headwall before passing through the culvert toward the Addison Canal. (Doc. 50, Exh. I at 35). The dredging eventually lowered water levels across hundreds of acres of open water and wetlands, primarily on the Refuge. Fish & Wildlife feared the lower water levels would harm species on the Refuge, and complained to St. Johns. On May 14, 1997, St. Johns entered an order (the "Emergency Order") allowing Fish & Wildlife to install earthen weirs in the affected canals to undo the effects of the dredging.

& Wildlife has employed riser boards since then or has any intent to do so.

(Plaintiff's A-117). The weirs were to be installed at heights that would restore the canals to the depths as they existed just before Modern's dredging – an elevation of 12.7 feet in NS1 and 11.7 feet in EW1. (Plaintiff's Exh. A-117 at 6). Some time thereafter, pursuant to the Emergency Order, Fish & Wildlife installed weirs at these heights in NS1 just north of EW1 and in EW1 just east of NS1, both on Refuge property.

On August 27, 1997, St. Johns filed an Administrative Complaint and Proposed Order (the "Administrative Complaint"), alleging that Modern improperly excavated portions of the two canals and proposing two ways in which Modern could effectively restore them to their pre-excavation depths. (Pl. Exh. A-119). Modern and First Omni challenged both the Emergency Order and the Administrative Complaint. After a lengthy hearing, an administrative law judge found that the dredging exceeded the scope of routine custodial maintenance and therefore required a permit. (Pl. Exh. A-283). On June 15, 1999, the ALJ recommended that St. Johns uphold the Emergency Order and direct Modern to undertake one of the two potential corrective actions outlined in the Administrative Complaint. (Pl. Exh. A-283 at 187). One of those potential corrective actions required Modern to fill in the northernmost excavated section of NS1 to an elevation of 12.7 feet, based on survey data taken in early 1996 and early 1997. (Pl. Exh. A-119 at 15). This potential corrective action also required Modern to bulldoze the freshly excavated materials along the

remainder of NS1 back into the canal. (Pl. Exh. A-119 at 15).

Modern complained to St. Johns that, among other things, the weirs and the potential corrective actions in the Administrative Complaint were excessive in height and scope. (Doc. 50, Exh. J at 75). In December 1999, St. Johns rejected this argument and entered an order (the "Final Order") adopting those parts of the ALJ's recommendations that are relevant to this case. (Pl. Exh. A-134). St. Johns ordered Modern to undertake one of the two sets of corrective actions set forth in the Administrative Complaint. ((Pl. Exh. A-134 at 106). Modern appealed the Final Order, but the First District Court of Appeals affirmed it in all relevant respects. *St. Johns River Water Management Dist. v. Modern, Inc.*, 784 So. 2d 464 (Fla. 1st DCA 2001). By July 2003, Modern had substantially complied with the requirement to fill in the northernmost excavated section of NS1 and bulldoze the newly excavated material back into the canal. (Doc. 449 at 29).

With the administrative process complete, Modern and First Omni proceeded with inverse condemnation claims in state court against St. Johns and FDOT.[11] In October 2002, the Plaintiffs filed their

---

[11] The Plaintiffs had filed a state court suit in 1997 but ran afoul of the rule requiring exhaustion of administrative remedies. The state court dismissed the original complaint and held the suit in abeyance until the administrative proceedings ran their course. (Doc. 71 at 8).

Second Amended Complaint, adding Fish & Wildlife as a defendant. Subsequently, the Defendants timely removed the case to this Court. Now operating under their Fourth Amended Complaint (Doc. 71), the Plaintiffs proceeded to trial on the following claims: inverse condemnation by way of flooding against St. Johns and FDOT (Counts I and II); declaratory relief against St. Johns and FDOT to establish the existence and location of drainage easements (Count III); an action under 28 U.S.C. § 2409a to quiet title against the United States as to various drainage easements across the Refuge (Count IV); and injunctive relief against FDOT and St. Johns for trespass (Count V). The Plaintiffs reserved their right to pursue their inverse condemnation claims against the United States. (Doc. 70 at 9).

The case was tried, without a jury, over four days in August 2006, eight days in April 2007, and two days in May 2007. The parties submitted their post-trial memoranda on July 30, 2007.

III. Analysis

Although this case has consumed more than 10 years of litigation, hundreds of hours of courtroom time and tens of thousands of pages of documents – as well as, the Court assumes, substantial attorneys' fees – in the end it boils down to two questions: What drainage easements, if any, does Modern possess? And did FDOT or St. Johns interfere with Modern's

drainage rights and cause Modern's property to flood?[12]

A. Easements

An easement is a right in the owner of one parcel of land (known as the "dominant estate"), by reason of such ownership, to the unfettered use of the property of another (known as the "servient estate") for a special purpose not inconsistent with the general property rights of the owner. *See, e.g., Easton v. Appler,* 548 So. 2d 691, 694 (Fla. 3d DCA 1989). Easements may be created by express grant, by implication, or by prescription. *American Quick Sign, Inc. v. Reinhardt,* 899 So. 2d 461, 465 (Fla. 5th DCA 2005). Once created, an easement is transferred with the dominant estate even if not mentioned in the instrument of transfer. *Behm v. Saeli*, 560 So. 2d 431, 432 (Fla. 5th DCA 1990).

The Plaintiffs contend that they possess express, implied, and common law drainage easements through the Refuge. (Doc. 71 at 14). Prior to trial, the Court granted summary judgment to the United States on Plaintiffs' common law flowage easement claim (Doc. 392 at 11-12) and Plaintiffs' claims that language in certain deeds dated 1915, 1917, and 1957 created an easement (Doc. 392 at 12). The Court also rejected Plaintiffs' efforts to add a prescriptive easement

---

[12] As noted above, the Plaintiffs are not pursuing an inverse condemnation claim against the United States in this action.

claim. (Doc. 382 at 1). At trial the Court rejected the Plaintiffs' argument that Spanish Civil law established their drainage rights. The Plaintiffs' remaining easement claims are addressed below.

1. Express easements

An express easement may be created by way of a grant contained in a deed or other written document. *Id.* at 464-65. An express easement may also be granted by way of dedication and acceptance, which entails an intentional appropriation of land by the owner for use by others. *Owen v. Yount*, 198 So. 2d 360 (Fla. 2d DCA 1967) (filing of plat with 25-foot wide lakefront lot marked "drainage easement" and that lot's subsequent use by non-lakefront landowners to access lake created public drainage easement with secondary use of lake access).

The Plaintiffs' express easement claim rests on the plat for the Titusville Fruit Tract. (Pl. Exh. A-3). The platted area encompasses the Plaintiffs' property, the land upon which the Drainage System was constructed, and most of the property that comprises the Refuge. No reference to "drainage" or "canals" or the like appears on the plat. However, in addition to single lines that divide the platted area into five-acre lots, a grid of double lines criss-crosses the plat. A wide set of double lines runs along the border of each of the plat's one-square-mile Sections. In addition, each Section is split in half from north to south by a thinner set of double lines and split into fourths from

east to west by three sets of these thinner double lines. According to the legend that appears on the plat, the wider set of double lines indicates "50 Ft. Road", while the thinner set of double lines indicates "20 Ft. Road."

Generally speaking, the evidence at trial showed that the Drainage System was laid out in the locations shown on the plat by these double lines. More specifically, although the Drainage System never occupied all of the areas shown as roads on the plat, it was constructed, with minor exceptions, in those areas. Based on this, the Plaintiffs argue (in several different ways) that the "road" language on the plat resulted in the creation of an easement in the Drainage System for the benefit of their predecessors in title and themselves.

As a general principle, an easement carries with it the right to do what is reasonably necessary for the full enjoyment of the easement itself. *Florida Power Corp. v. Silver Lake Homeowners Ass'n*, 727 So. 2d 1149, 1150 (Fla. 5th DCA 1999) (citing, *inter alia*, 20 Fla.Jur.2d Easements § 29 (1980)). As shown at trial by the testimony of Plaintiffs' drainage expert, Robert Sprinkle, excavation of a drainage ditch is often the first step in the construction of a road across a marshy area, and such roads would likely become impassable in the absence of drainage. The ditch spoil provides the material to raise the road above the surrounding marsh, and the ditch drains the surface water and lowers the water table, stabilizing the soil. Based on this, the Court assumes that any road

easement created by the Titusville Farms plat carried with it the right to build and maintain such ditches as were necessary to drain the road.

However, contrary to the Plaintiffs' argument, this does not establish that the plat created an easement that would entitle the Plaintiffs to utilize the Drainage System.[13] What the Plaintiffs are arguing for is an easement that allows not just drainage of a road, but a drainage easement independent from an adjacent roadway. And they are seeking to impose that easement on property that, although described as "50 Ft. Road" or "20 Ft. Road" on the plat, never had a road built upon it.[14] The right to do what is needed to enjoy an easement must not be increased to any greater extent than reasonably necessary and

---

[13] The Plaintiffs have consistently argued that they are entitled to an easement extending over the entire Drainage System, rather than merely some fraction of it. *See, e.g.*, Doc. 449 at 46. The Court notes that the state of Florida follows the "beneficial" or "complete enjoyment" rule with regard to implied easements: "This rule is 'that the extent of the grantee's private right of user in streets and alleys shown on a map or plat by reference to which his conveyance was made is *limited to such streets and alleys as are reasonably and materially beneficial to the grantee and of which the deprivation would reduce the value of his lot.*'" *Powers v. Scobie*, 60 So. 2d 738, 740 (Fla. 1952) (emphasis added).

[14] Moreover, the evidence showed that a number of the ditches that were built on areas platted for 20-foot roads were themselves about 20 feet wide, precluding the construction of a road there.

contemplated at the time the easement was created. *Silver Lake Homeowners Ass'n* at 1150.

Although a road easement may include an associated right to some drainage, there is no evidence that the people who drew up the Titusville Fruit plat intended, at that time, to stretch the concept to such an enormous degree. The Court concludes that the Plaintiffs have failed to show that the term "road" on the plat was intended to mean anything more than a road or to create an easement in the Drainage System. This conclusion also disposes of the Plaintiffs' argument that the plat constituted an offer to dedicate the Drainage System to the public or to purchasers of lots within the Titusville Fruit Tract. If anything was so dedicated, it was a road, not a drainage system.

2. Implied easements

Primarily as a consequence of the statute of frauds,[15] which requires that transfers of property interests be evidenced by a writing, there are only two situations under Florida law in which an easement can be granted or conveyed by implication. *Moorings Association, Inc. v. Tortoise Island Communities, Inc.*, 460 So. 2d 961 (Fla. 5th DCA 1984) (Cowart, J., dissenting).[16] The first involves inferring the grant

---

[15] Fla. Stat. § 725.01.

[16] On appeal, the Florida Supreme Court reversed the decision of the Fifth DCA, agreeing with Judge Cowart's "well reasoned dissent" and adopting his reasoning "as our own". *Tortoise*

(Continued on following page)

from a construction of the terms and effects of an existing deed – such as when a deed describes a lot by reference to a plat that shows servient lands held for the use and benefit of the subdivided lots, or where there is ambiguity as to the extent of an easement validly created by a written document. *Id.* at 971. In these situations, the deed or written document satisfies the statute of frauds, and the easement is merely created by implication from the writing and intention of the parties. *Id.* Such is not the case here. As discussed *supra,* the Titusville Fruit plat did not create any standalone drainage easements, and there is no other written document that even arguably created easements but was ambiguous as to their scope.

The second situation involves what is referred to as an action to establish an easement for a way of necessity. *Tortoise Island* at 971. In this scenario, as described by Judge Cowart, the seller agrees to sell part of a larger tract, but the only access to the buyer's new property is a public road across the property retained by the seller. *Id.* at 971. Even though the parties had not considered the access issue, the common law assumed that the seller was acting in good faith and intended to convey the beneficial use of that property to the buyer and therefore "raised up or implied as a matter of law a promise on the part of the seller to give a right-of-way of necessity to the

---

Island Communities, Inc. v. Moorings Association, Inc., 489 So. 2d 22, 22 (Fla. 1986).

buyer over and across" the property retained by the seller. *Id* 721.

The creation of an implied easement for a way of necessity requires 1) unity of title between the dominant and servient estate; 2) a conveyance; and 3) circumstances existing at the time of the conveyance which would make the easement necessary for the complete enjoyment of the estate granted or reserved. *Kirma v. Norton,* 102 So. 2d 653, 656-57 (Fla. 2d DCA 1958).[17] It has been held that a use, to be considered an implied easement, must have been continuous, apparent, permanent, and necessary when the unified title was severed. *Id.* at 567.

It is not clear that a drainage easement (as opposed to an access easement) can ever constitute a way of necessity that could be created by implication. For one thing, poor drainage is unlikely to be a complete bar to use of the land in the way that a lack of access would be. Owners of property with poor drainage have other options – such as filling in low spots or digging retention ponds – not available to owners of landlocked property. Even without such steps, poorly drained property likely has some potential beneficial uses, such as hunting or camping. And Florida law already provides property owners with a

---

[17] The Defendants argue that *Tortoise Island* impliedly overruled *Kirma*. After reviewing both cases, the Court concludes that in adopting Judge Cowart's dissent, the Florida Supreme Court overruled the appellate court's interpretation of *Kirma* rather than *Kirma* itself.

common law drainage easement for the surface waters that fall on their properties, further weakening the argument that an additional drainage easement is essential. *Gus Machado Buick, Inc. v. Westland Skating Center, Inc.*, 523 So. 2d 59, 597 (stating that the owner of higher elevation land has an easement on lower elevation land for the natural flow of surface water). Easements created by necessity have the implied purpose to make possible the use of the dominant land, and therefore will terminate when the necessity for their existence disappears. *Parham v. Reddick*, 537 So. 2d 132, 135 (Fla. 1st DCA 1988).

Nevertheless, assuming *arguendo* that a drainage easement can be created as a way of necessity, the Plaintiffs' argument on this score fails for several reasons. The Plaintiffs rely upon two effectively simultaneous 1957 conveyances by Sun Charm Ranch, Inc. ("Sun Charm") as the "transaction" that created their implied easements in the Drainage System.[18]

---

[18] In their closing arguments, the Plaintiffs for the first time suggested that they could rely upon conveyances of portions of the Titusville Fruit Tract to various third parties between 1913 to 1921 to establish their implied easements. (Doc. 449 at 49). However, the Plaintiffs made no effort to track these transactions and demonstrate how any individual transaction created an implied drainage easement for the benefit of the parcels they would eventually purchase. The Court cannot just assume that every transaction creates an easement. Moreover, the Plaintiffs failed to show that the entire Drainage System was in existence and operating before these transactions occurred – or, at least, that any canal in which they now claim an easement was in place prior to these transactions. The earliest photo showing the

(Continued on following page)

(Doc. 449 at 50). Sun Charm owned approximately 40 percent of the original Titusville Fruit Tract, and its holdings encompassed a large portion of the property that now makes up the Refuge. However, Sun Charm never owned all of the property that makes up the Refuge. As shown in a chart prepared by Mr. Sprinkle (Pl. Exh. A-257), Sun Charm owned only a small fraction – less than 10 percent – of the Refuge property west of Hacienda Road. The property that Sun Charm did own barely extended west of Hacienda Road (and, in some areas, did not even reach that far). Thus, the Sun Charm transaction could not have resulted in the creation of an implied easement in the overwhelming majority of the segment of the Drainage System located west of Hacienda Road. (As discussed below, this seriously undermines the Plaintiffs' claims that the plugging and filling of the canals west of Hacienda Road interfered with their drainage rights.)

Furthermore, Sun Charm's holdings contained numerous "gaps" – parcels owned by some other entity – at the time of the 1957 transaction. As shown on Mr. Sprinkle's chart, such gaps spanned the

---

Drainage System at least arguably in a complete state was taken in 1943. (Tr. 701). Relying on newspaper articles, Mr. Sprinkle opined that Titusville Fruit continued to dig and expand ditches on the Titusville Farms Tract at least through 1917 – several years after the earliest of these third party transactions. (Tr. 695-700). The Court finds that the Plaintiffs have failed to show that any of the transactions from 1913 to 1921 resulted in the creation of an implied easement.

Satterfield Road Canal, EW1.5, and the IRCC at different locations east of Hacienda Road. Two diagonally opposite gaps spanned EW1, reducing Sun Charm's property to a single point at that location. Sun Charm owned almost no property south of State Road 50, and gaps spanned portions of several of the north-south canals north of that highway. Thus Sun Charm lacked the unity of title needed for the Plaintiffs to claim entitlement to an implied easement in the Drainage System.

The evidence also demonstrated that the Plaintiffs do not possess the level of necessity required to claim entitlement to an implied easement under *Kirma*. Charles Moehle described the Drainage System as having "redundant" drainage capacity – i.e., more than just what is necessary to drain the Plaintiff's property. Plaintiffs' drainage expert, Robert Sprinkle, also testified that the Drainage System, when fully clear, "has some redundancy in it." (Tr. 1118 at 6-7). Most damaging is the fact that, as soon as the dredging was performed on NS1 and EW1, Modern's property began draining to the south, under State Road 50. If these portions of NS1 and EW1 are enough, by themselves, to drain Modern's property, the Plaintiffs cannot claim that they require easements in the entire Drainage System or even easements running west across the Refuge.

Finally, the Plaintiffs failed to show that the Drainage System had been in continuous use at the time they purchased their properties. The canals west of Hacienda Road had been plugged (though not filled

in entirely) long before Modern bought its parcel (Tr. 546). Many of the other canals had become silted or overgrown with vegetation, and some had been blocked by subsequent construction. Aerial photographs of Modern's parcel taken in 1943, 1951 and 1958 show NS1 and EW1 clear and draining well. (Def. Exh. 596-598). However, a photo taken in 1969 shows EW1 blocked just east of the intersection with NS1. (Def. Exh. 599). A photo taken in 1971 shows the same blockage, plus another blockage in NS1 just north of the intersection, and shows that a portion of NS1 just south of the intersection has become silted in. (Def. Exh. 479). Subsequent photos from 1980, 1986, 1989, 1994, and 1995 show the same thing, although the silted-in portion of NS1 appears longer. (Def. Exh. 600-604).

The Plaintiffs have failed to show that the Sun Charm transactions (or any other transactions) led to the creation of an implied easement for a way of necessity.

B. Flooding

Under Florida law, state action that causes flooding on abutting private property may constitute a taking where the flooding is a permanent invasion of land amounting to an appropriation. *See, e.g., Kendry v. State Road Department,* 213 So. 2d 23, 26 (Fla. 4th DCA 1968). Plaintiff's claim for inverse condemnation against St. Johns and FDOT is predicated primarily on the expert report and testimony of

Mr. Sprinkle, a Florida professional engineer who specializes in drainage issues. In formulating his opinion, Mr. Sprinkle used a standard modeling technique (the ICPR, or Interconnected Channel and Pond Routing Model) to measure the hydrological effect of certain activities over a period of time – a before-and-after look at the wetness of Plaintiff's property. As the starting (before) date, he used 1970, which was just prior to the creation of the refuge and restoration activities that occurred thereafter.[19] As his end (after) date, he used 2003, when the Plaintiff claims its flooding claim matured.

In simplest terms, the ICPR model depicts the basins in which water collects and the links, such as canals or culverts, by which the water moves or which can impede its movement. For each basin and link in the model, values are input for factors that affect runoff, such as topography, soil type, ground cover and, of course, the amount of rainfall. (Tr. 416). The model can then generate a runoff hydrograph, depicting the water levels that would result and the duration of any flooding after a particular amount of rain over the area. (Tr. 775).

---

[19] The Plaintiffs contend that the property was dry in the 1970s, and in support point to a field survey of dusky habitat performed by Dr. Baker in 1973. (Pl. Exh. A-17). However, Defendant's expert, William Dunn, observes that the survey was conducted during drought conditions. (Tr. 2020). Moreover, Dr. Baker was concerned with the ground cover affecting duskies and not the hydrological conditions. In any event, it is probably true that the property was drier in 1970 than it is today.

To create his 2003 model, Mr. Sprinkle made changes in his 1970 model that reflected the following events:

(1) the filling of the ditches west of Hacienda Road as part of the FDOT mitigation project;

(2) the installation of culverts under Hacienda Road as part of that project;

(3) the installation by Brevard County of culverts under Hacienda Road after the Plaintiffs complained of flooding in 1996;

(4) blockages in EW1 and EW1.5 in the Refuge east of Hacienda Road occurring as a result of lack of maintenance;

(5) a blockage of NS2 south of State Road 50 near the Great Outdoors RV park, resulting from construction there;

(6) a blockage across NS1 south of State Road 50 near a wastewater treatment plant, also resulting from construction there;

(7) Fish & Wildlife's installation of a weir in NS1 just north of its intersection with EW1 as a result of the Final Order;

(8) Fish & Wildlife's installation of a weir in EW1 just east of its intersection with NS1 as a result of the Final Order; and

(9) the filling-in of 500 feet of NS1 south of EW1 as a result of the administrative proceedings.

(Tr. 789; Pl. Exh. A-259).[20]

After running both models, Mr. Sprinkle concluded that in 1970, the ditch system was adequate to effectively drain Plaintiff's property, but in 2003, the system could no longer do so. (Tr. 800-03). Indeed, Sprinkle's model reflected a significant increase in the flooding of Plaintiff's property in 2003, compared with 1970. (Tr. 805; Pl. Exh. A-216). Moreover, Mr. Sprinkle performed a field validation of his model results after Hurricane Wilma passed through the area in October of 2005. According to Mr. Sprinkle, the elevation measurements taken after this storm event[21] closely coincided with the prediction of his 2003 model results. (Tr. 811). In sum, Mr. Sprinkle opined that the water table on Plaintiff's property

---

[20] At trial, the parties also spent a significant amount of time discussing two effects of the State Road 50 widening: the removal of a drainage ditch that had run along the south side of the highway; and the installation of an allegedly ineffective "underdrain" system in the median. In their closing arguments, the Plaintiffs argue that these activities also impeded the Drainage System and contributed to the flooding. (Doc. 449 at 16-18). However, Sprinkle testified that these items were not included in his models, and therefore they could not have contributed to the increased water levels in his 2003 model. (Tr. 1025-27). The Court finds that the evidence is insufficient to consider them as possible contributors to the flooding.

[21] *See* Pl. Exh. A-293.

has increased significantly (two to three feet) since 1970, leading to significantly more flooding.

The Defendants criticize Sprinkle's modeling in various ways. For example, Defendants called as their own expert Ms. Cynthia Skogsberg, a licensed professional engineer who also specializes in drainage modeling. Ms. Skogsberg did not prepare her own model; rather, she offered a critique of Mr. Sprinkle's model.[22] Specifically, Ms. Skogsberg opined that:

(a) because 1970 was a dry year and 2003 was a wet year, Mr. Sprinkle's comparisons between the two years is not scientifically valid (Tr. 2072);

(b) Mr. Sprinkle's model misplaced the culverts under Interstate 95 at Satterfield Road (Tr. 2079);

(c) it was inappropriate to model the IRCC and northside SR 50 ditch as a double ditch (Tr. 2082);

(d) Mr. Sprinkle used improper ditch cross-sections (Tr. 2101);

(e) Mr. Sprinkle's 1970 model curve numbers were wrong (Tr. 2136);

(f) the starting surface water elevation used by Mr. Sprinkle for the 1970 model was too low (Tr. 2147); and

---

[22] According to Ms. Skogsberg, she would require a complete survey of the entire ditch system in order to run an accurate drainage model. (Tr. 2217). Mr. Sprinkle contends that such a survey would be prohibitively expensive.

(g) Mr. Sprinkle's basin delineations fail to account for surface water runoff (Tr. 2175).

According to Ms. Skogsberg, these errors render Mr. Sprinkle's results invalid and serve to exaggerate the flooding effects of the factors modeled by Sprinkle.[23] Ms. Skogsberg dismisses the results of Mr. Sprinkle's Hurricane Wilma field validation as mere coincidence. (Tr. 2177).

Defendants also called Dr. Devo Seereeram, an expert in hydrology, who criticized Mr. Sprinkle's conclusion that the Drainage System as it functioned in 1970 would serve to lower ground water elevations across the property by several feet. Using a conservative ditch cross-section, Dr. Seereeram concluded that the three-foot water table draw-down predicted by Mr. Sprinkle would occur only immediately next to the ditches, and that a two-foot draw-down would extend less than 70 feet from the edge of the ditch. (Def. X-B728). Thus, according to Dr. Seereeram, in order to lower the water table on Modern's property by two to three feet, the drainage ditches would have

---

[23] Defendants also contend that Sprinkle's model is invalid because it uses a start date of 1970, which is almost 20 years prior to any *relevant* conduct by the State defendants. For the reasons expressed *infra*, the Court agrees with this criticism. The relevant conduct of these Defendants occurred in the late 1980s-early 1990s. During the interim (1970-1990), the ditches were not being maintained and significant erosion/degradation likely occurred which would adversely affect their drainage capability.

to be spaced no more than about 150 feet apart. (Tr. 1665-66).

However, even assuming Mr. Sprinkle's hypothesis to be true (*i.e.*, that the water table on Modern's property has risen significantly since 1970, resulting in more frequent and longer post-rainfall flooding), the critical question becomes, what caused this increase? More specifically, the question is whether this increase is attributable to any conduct of the state defendants?[24] To answer this, we must examine the nine changes modeled by Mr. Sprinkle.

---

[24] The Plaintiffs attempt to avoid this issue by arguing that FDOT and St. Johns can be held jointly and severally liable for the flooding shown by Mr. Sprinkle's model. Modern points out that under Florida law, where the conduct of two or more governmental entities combines to cause harm to a property owner, the entities can be held jointly liable for the harm. *See, e.g., Anhoco Corp. v. Dade County,* 144 So. 2d 793 (Fla. 1962) (in condemnation suit, county held responsible for State Road Department's restriction of access to subject property, even though road department was not party to suit, where restriction occurred as part of joint project involving county and road department). *Accord, Lost Tree Village Corp. v. City of Vero Beach*, 838 So. 2d 561 (Fla. 4th DCA 2002) ("Multi-government action, of which the combined effect deprives a landowner, constitutes a taking.").

But even if one accepts Mr. Sprinkle's model as true, this principle is not applicable here. Mr. Sprinkle did not model the results of a joint undertaking, as was the case in *Anhoco Corp.*, or a situation in which the combined effects of two defendants' (otherwise non-harmful) activities constituted a taking, as in *Lost Tree Village*. Mr. Sprinkle showed that if nine things change, flooding results. He did not show that all nine changes were needed to cause that flooding, and as discussed *infra*, these

(Continued on following page)

First, it must be noted that Mr. Sprinkle made no effort to apportion the effect of these nine factors, saying it was "almost impossible to isolate an impact". (Tr. 851). However, he admitted that some of the factors have more impact than others. (Tr. 1118). In particular, he opined that the items closest to the Modern property would have the greatest impact on its water level. He estimated that the weir in NS1 and the 500 feet of fill-in of NS1 probably had the greatest impact, with the weir in EW1 being behind those two. Behind those three items would be the blockages in EW1 and EW1.5 east of Hacienda Road, followed by the culverts under Hacienda Road if the riser boards were to be installed. The remaining items – the filling of the ditches west[25] of Hacienda Road, the blockages of NS2 and NS1 south of State Road 50 – would rank behind the other items. (Tr. 1171-72).

More importantly, most of the changes modeled by Mr. Sprinkle cannot be attributed to St. Johns or FDOT. The weirs and the filling-in of 500 feet of NS1 (factors 7-9) merely reestablished the status quo as it existed before Modern's unpermitted dredging and

---

defendants were not responsible for all nine changes. Joint and several liability is not appropriate under such a scenario. The Plaintiffs cannot avoid their obligation to establish each defendant's liability by including them in a group with someone else who may be liable.

[25] In this portion of his testimony, Sprinkle actually referred to ditches "east" of Hacienda Road, but given the context, he must have meant to refer to the ditches west of that road.

cannot themselves constitute a legal cause of any subsequent flooding. No evidence at trial linked FDOT or St. Johns to the blockages in EW1 and EW1.5 east of Hacienda Road or the blockages in NS1 and NS2 south of State Road 50 (factors 4-6). Moreover, the evidence was uncontradicted that the installation of culverts under Hacienda Road (factors 2-3) improved drainage, not hampered it.

The Plaintiffs, however, raise a different argument in regard to this final point. The new culverts under Hacienda Road included riser structures, which allowed Fish & Wildlife to add riser boards and completely block the flow of water. The Plaintiffs contend that, because no Defendant agreed to be bound not to ever employ these riser boards, this Court is "compelled" to assume that those riser boards will be employed in the future. (Doc. 449 at 19 n.6). In support, the Plaintiffs point to *Department of Transportation v. St. Regis Paper Co.*, 402 So. 2d 1207 (Fla. 1st DCA 1981).

In the *St. Regis Paper* case, FDOT was condemning a portion of a lot for a highway, and the condemnation eliminated the road that had been used to access the lot. *Id.* at 1208. FDOT's construction plans for the highway showed that there would be no access to the remainder of the lot. *Id.* The trial court refused to allow FDOT to introduce two of its standard documents as evidence that it would, nonetheless, construct a turnout to allow access to the remainder of the lot. *Id.* The trial court also refused to allow an engineer to testify to this effect. *Id.*

Instead, the trial judge directed a verdict for the landowners based on the assumption that the worst possible damage – *i.e.*, total deprivation of access – would occur to the remaining property. *Id.* On appeal, the First District Court of Appeal affirmed the decision, finding 1) that there was nothing in the plans or the standard documents that showed any access to the landowners' property and 2) that the engineer did not have the authority to make commitments on behalf of FDOT *Id.* As such, the trial court had not erred in refusing to admit the disputed evidence or in directing a verdict for the landowners. *Id.*

In the words of the Florida Supreme Court, the *St. Regis Paper* line of cases stands for the proposition that a condemnor may not present evidence of its nonobligatory, permissive policy of allowing the condemnee to continue certain uses of the taken property. *Trailer Ranch, Inc. v. City of Pompano Beach*, 500 So. 2d 503, 506 (Fla. 1986). "Allowing this type of permissive policy to be presented to the jury for determining the extent of damages is misleading because it suggests that the condemnee retains a greater property interest that he actually does, as the policy may change at the condemnor's will at any time in the future." *Id.*

This principle of law has no application in an inverse condemnation context, where the court must determine whether the defendants' policies have resulted in a taking rather than the damages caused by that taking. Stated differently, the Plaintiffs

cannot use *St. Regis Paper* to bootstrap a potential future taking into an actual taking.

Thus, the only potential flooding cause from Mr. Sprinkle's model that can be attributed to FDOT or St. Johns is the filling of ditches west of Hacienda Road as part of the mitigation project (factor 1). As a result, the only relevant issue is whether and to what extent the filling of these ditches affected the upstream impoundment of water on Plaintiff's property.[26]

In this regard, two things are apparent: (1) the biggest contributing factor to Plaintiff's flooding is the blockage of the ditches at or near the intersection of NS1 and EW1;[27] and (2) the filling of ditches west of Hacienda Road had little, if any, impact on Plaintiff's property.

With respect to the latter, when Charles Moehle complained in 1996 about the flooding of Modern's property, Ralph Brown, a supervising engineer with St. Johns, was asked to investigate. Specifically, he tried to ascertain whether the FDOT mitigation

---

[26] At the outset of this discussion, it is important to note that during the 1970s, as part of its dusky recovery plan, Fish & Wildlife had plugged these ditches at regular intervals. Thus, when the FDOT mitigation plan was implemented in the late 1980s, the ditches west of Hacienda Road were no longer providing unobstructed drainage.

[27] Mr. Sprinkle admits as much. (Tr. 2488). Moreover, the excavation of EW1 and NS1 were enough to effectively drain Modern's property. (Tr. 110, 824).

project west of Hacienda Road had any impact on the upland property. (Tr. 1826). As part of his investigation, he surveyed and photographed the ditches east of Hacienda Road, with particular emphasis on EW1 and NS1. He found that EW1 west of NS1 was shallow (elevation of 12.6 feet) and totally overgrown with vegetation. (Tr. 1828).[28] Likewise, NS1 just south of its intersection with EW1 was shallow and overgrown with vegetation. Since the elevation of EW1 at Hacienda Road was 11 feet, he concluded that the control elevation of EW1 was east of Hacienda Road. (Tr. 1860, Def. Exh. A-688-1). Thus, because the FDOT mitigation project *increased* the culvert capacity under Hacienda Road and because elevations decrease west of Hacienda Road, he concluded that the mitigation work could not be the cause of any flooding on Modern's property. (Tr. 1866).

As its drainage expert, FDOT called Mark Llewellyn, a registered professional engineer who specializes in storm water management. Mr. Llewellyn summarized the human activities which, over time, have affected this 3,500 acre drainage basin. He then discussed the State Road 50 mitigation project, including the filling of ditches west of Hacienda Road and the installation of eleven 36-inch culverts under Hacienda Road (nine by Fish & Wildlife and two by Brevard County) to replace the six or seven 30-inch

---

[28] Other blockages east of Hacienda Road were also noted.

culverts that had previously run under Hacienda Road. (Tr. 2303).

Mr. Llewellyn's hypothesis was that Hacienda Road and the un-ditched marsh to the west (post-mitigation) would have no impact on water staging to the east of Hacienda Road. To test this hypothesis, he assumed a worse-case scenario with all water in the basin flowing toward Hacienda Road. (Def. Exh. B-584, Tr. 2317). With this underlying premise, he modeled several different storm events with two different tailwater conditions. The results of this modeling experiment revealed no impact on the east side of Hacienda Road. During rainfall events, the water would sheet-flow over the saturated marsh even without the benefit of the shallow ditches that existed pre-mitigation. (Tr. 2319). Because of this, and because of the ample flowage capacity provided by the larger and more numerous culverts installed under Hacienda Road,[29] he concluded that the mitigation project would have no adverse impact on Plaintiff's property. (Tr. 2318). (Tr. 2319).

Finally, Ms. Skogsberg ran various scenarios of Mr. Sprinkle's models by changing certain inputs to values that she deemed more reasonable. (Tr. 2178). Under scenario 8 (Def. Exh. 743), she used what she

---

[29] Of course, this assumes that riser boards have not been installed in the culverts. However, Mr. Sprinkle modeled these culverts as being open – *i.e.*, without riser boards installed – in his 2003 model. (Tr. 853).

believed to be appropriate curve numbers and roughness coefficients to ascertain the effect of the Hacienda Road mitigation project. Under this scenario, the upstream effect on Plaintiff's property using the Sprinkle model was less than one-third of an inch. (Tr. 2184-85).

Based on this evidence, the Court concludes that Plaintiff has failed to meet its burden of proving that any relevant conduct by FDOT or St. Johns has contributed to the alleged flooding of Plaintiffs' property. Indeed, the evidence is to the contrary.[30] Moreover, the relevant conduct (filling of ditches west of Hacienda Road) merely restored the marsh to its natural condition. Thus, absent easement rights, even if this conduct caused water to impound, it is hard to see how it could form the basis for a flooding claim. Certainly, the Plaintiffs never made a convincing argument or cited to any legal precedent for such an effect.

---

[30] If Modern's property is flooding due to poor drainage, it is caused primarily by the blockages at EW1 and NS1 near their intersection. As noted *supra*, aerial photography clearly shows that occlusions existed at these locations in 1991 when Modern purchased the property. The subsequent placement of the weirs and filling-in of NS1 merely restored the blockages that existed before the improper dredging. The Plaintiffs presented no evidence to suggest that the weirs or the restored NS1 had elevations higher than those set forth by St. Johns in the Emergency Order or the administrative proceeding.

IV. Conclusion

It is generally agreed that the Plaintiffs' property was originally part of the St. Johns River flood plain and, therefore, wetland. In the early 1900s, the property was ditched and drained to make it suitable for farming and habitation. However, the last evidence of ditch maintenance was in 1958, and the Drainage System thereafter began a natural process of erosion and degradation. Dr. Dennis, the Plaintiffs' environmental expert, testified that the property was still essentially dry in 1970 but became increasingly wetter by 2003. Therefore, it is likely that by 1990, 20 years, later, Modern's property was much wetter than it had been. Aerial photography showing occlusions in the essential drainage features of the property (EW1 and NS1) bolsters this conclusion.

Charles Moehle contends that he did substantial on-site inspection and the property was dry when Modern purchased it in 1991. Perhaps, but that contention is strongly rebutted by the evidence. And, even if it were so, there is no evidence to suggest that any activities of St. Johns or FDOT could have caused the property to flood several years later. In short, Modern's claim that the conduct of those Defendants caused his property to flood after 1991 simply does not add up. Plaintiffs' property is wet because it was historically wet and because the 75-year-old system of drainage ditches is no longer viable.

In consideration of the foregoing, it is hereby

ORDERED that the Clerk enter judgment in favor of the Defendants and close the case.

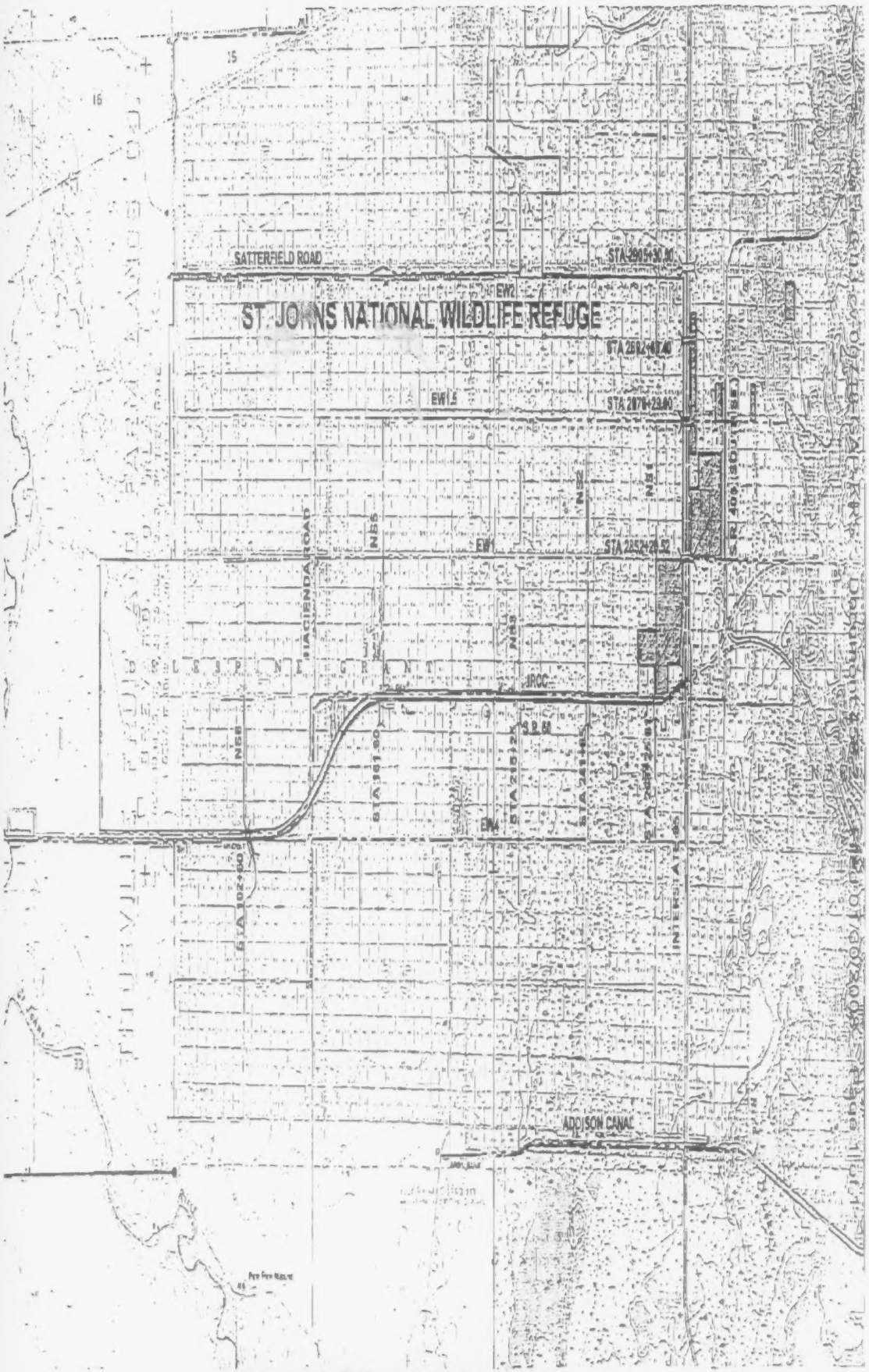
DONE and **ORDERED** in Chambers, Orlando, Florida on January 28, 2008.

/s/ Greg Presnell
GREGORY A. PRESNELL
UNITED STATES
DISTRICT JUDGE

Copies furnished to:

Counsel of Record
Unrepresented Party

App. 41



BEST AVAILABLE COPY

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

MODERN, INC., and FIRST OMNI SERVICE CORP.,

Plaintiffs,

-vs-

Case No. 6:03-cv-718-Orl-31KRS

STATE OF FLORIDA, DEPARTMENT OF TRANSPORTATION, ST. JOHNS RIVER WATER MANAGEMENT DISTRICT, and UNITED STATES FISH & WILDLIFE SERVICE,

Defendants.

AMENDED ORDER[1]

(Filed Aug. 16, 2006)

This matter comes before the Court on the motion to dismiss or, in the alternative, for summary

---

[1] In the final paragraph of Section III(D) of the original order (Doc. 351), the Court at several points inadvertently referred to an "implied easement" when it intended to refer to an "easement". Aside from that correction, this amended order is unchanged from the original.

judgment (Doc. 215) filed by Defendant United States Fish & Wildlife Service ("Fish & Wildlife"), the response (Doc. 243) filed by the Plaintiffs, Modern, Inc. ("Modern") and First Omni Service Corp. ("First Omni"), and the reply (Doc. 276) filed by Fish & Wildlife.

I. Background

The Plaintiffs – henceforth referred to as "Modern" for ease of reference – and Defendants Fish & Wildlife and St. Johns River Water Management District ("St. Johns") own or manage real estate in the area of the intersection of Interstate 95 ("I-95") and State Road 50 ("S.R. 50") near Titusville. Modern owns several parcels (collectively, the "Property") that are located, in general terms, adjacent to I-95 north of the intersection. (Doc. 292). According to Modern, the three tracts it owns total approximately 142.5 acres of land. (Doc. 71 at 3). The approximately 6,200-acre St. Johns National Wildlife Refuge (the "Refuge") is located to the west and north of the Property[2]. (Doc. 251 at 4). The federally owned Refuge is managed by Fish & Wildlife. (Doc. 298 at 2). St. Johns owns and manages two parcels of conservation land – the

[2] The Refuge actually consists of two non-adjacent parcels – the Highway 50 Unit, which lies to the west and north of the Property, and the Beeline Unit, which is located far to the south of the Property. (Doc. 251 at 4-5). The Beeline Unit is not relevant to this dispute, and therefore the term "Refuge" in this opinion will refer only to the Highway 50 Unit.

Seminole Ranch and the Canaveral Marsh – which abut the Refuge on portions of its western and southern boundaries, respectively. (Doc. 298 at 2-3).

The Property and the Refuge were, at one time, part of the Titusville Fruit and Farm Lands Subdivision ("Titusville Farms"), which was platted in the early 1900s.[3] (Doc. 289 at 3). The natural sheet flow of water on the Titusville Farms was generally from the northeast to the southwest, toward the St. Johns River, which passes near the southwest corner of the Refuge. (Doc. 289-4 at 2) Over the years various canals were excavated on the Titusville Farms land to redirect the natural flow of surface water and drain it more efficiently. Modern refers to these canals as the "Drainage System."[4] (Doc. 289 at 4).

In the 1970s, Fish & Wildlife began acquiring portions of Titusville Farms, creating the Refuge in an (ultimately unsuccessful) effort to save the endangered Dusky Seaside Sparrow. (Doc. 289 at 7).

---

[3] The date of the platting is in dispute. Modern contends it occurred in 1911. (Doc. 289 at 3). Fish & Wildlife contends that the plat shows on its face that it was recorded in 1914. (Doc. 251 at 2).

[4] Modern does not specify the locations or completion dates of the canals that it believes are or were part of the Drainage System. While reserving judgment as to whether a "Drainage System" ever existed, the remainder of this opinion will utilize that term to refer to the drainage canals that now exist or existed at some time after 1911 on the land constituting Titusville Farms.

Around the same time, St. Johns began acquiring property in and around Titusville Farms to protect the St. Johns River. (Doc. 289 at 8). Over time, both Fish & Wildlife and St. Johns have taken steps such as filling in canals – or allowing others to fill them in – that have reduced the efficiency of the drainage on the land they manage and own, respectively. (Doc. 289 at 10-12).

The record is not entirely clear, but it appears that Modern acquired the Property via a series of transactions in the 1990s. (Doc. 71 at 19-82). In 1996, Modern began complaining to St. Johns of flooding, allegedly caused by restriction and plugging of canals in and around the Refuge. (Doc. 292). After a series of meetings between Modern and Brevard County, the Florida Department of Transportation, and Fish & Wildlife, a deal was worked out to have some canals that bordered the Refuge altered in an effort to eliminate the flooding of the Property. (Doc. 292-4 at 2).

In February 1997, Modern performed what it described as maintenance of some ditches on and near the Property in an attempt to alleviate the flooding. (Doc. 289 at 14). Shortly thereafter, Fish & Wildlife discovered that hundreds of acres of Refuge wetlands north of the intersection of S.R. 50 and I-95 had begun drying up. (Doc. 292-5 at 2). St. Johns concluded that Modern's ditch work went far beyond mere "maintenance" and had resulted in the draining. (Doc. 292-6 at 2-3). St. Johns authorized Fish & Wildlife to construct two weirs to stop the draining

and filed an administrative complaint seeking to have Modern undo the ditch work and restore the Refuge wetlands. (Doc. 292-6 at 3). Modern fought these measures, but in 2001 the First District Court of Appeal sided with St. Johns, upholding its determinations.[5] (Doc. 292-6 at 3).

Modern had filed suit in state court in 1997, seeking damages for the flooding under a number of theories. (Doc. 71 at 8). The state court dismissed the complaint and held the suit in abeyance until Modern exhausted its administrative remedies. (Doc. 71 at 8). After the decision of the First District Court of Appeals, Modern reinstituted its damages suit, which was subsequently removed to this Court. (Doc. 1). Modern, now proceeding under its Fourth Amended Complaint, makes inverse condemnation claims against St. Johns (Count I) and FDOT (Count II), requests a declaratory judgment as to its drainage easement rights in the land controlled by those defendants (Count III),[6] seeks to quiet title under federal law (28 U.S.C. § 2409a) against Fish & Wildlife (Count IV), and finally, in the alternative, demands permanent injunctive relief to prevent St. Johns and FDOT from interfering with the operation of the drainage ditches and requiring them to abate the flooding of the Property (Count V). (Doc. 71). In Count IV – the only Count targeting Fish &

---

[5] Modern contends it had "substantially completed" the restoration by July 2003. (Doc. 289 at 15).

[6] This Count was recently dismissed. (Doc. 330 at 15).

Wildlife directly – Modern seeks to have this Court adjudicate the existence, location, scope and extent of its drainage easements within the Refuge, as well as declaring that Fish & Wildlife has interfered with those easements. (Doc. 71 at 14).

II. Standards

A party is entitled to summary judgment when the party can show that there is no genuine issue as to any material fact. Fed.R.Civ.P. 56(c). Which facts are material depends on the substantive law applicable to the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The moving party bears the burden of showing that no genuine issue of material fact exists. *Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 608 (11th Cir. 1991).

When a party moving for summary judgment points out an absence of evidence on a dispositive issue for which the non-moving party bears the burden of proof at trial, the nonmoving party must "go beyond the pleadings and by [his] own affidavits, or by the depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 324-25 (1986) (internal quotations and citation omitted). Thereafter, summary judgment is mandated against the nonmoving party who fails to make a showing sufficient to establish a genuine issue of fact for trial. *Id.* at 322, 324-25. The party opposing a motion for summary

judgment must rely on more than conclusory statements or allegations unsupported by facts. *Evers v. Gen. Motors Corp.*, 770 F.2d 984, 986 (11th Cir. 1985) ("conclusory allegations without specific supporting facts have no probative value").

The Court must consider all inferences drawn from the underlying facts in a light most favorable to the party opposing the motion, and resolve all reasonable doubts against the moving party. *Anderson*, 477 U.S. at 255. The Court is not, however, required to accept all of the non-movant's factual characterizations and legal arguments. *Beal v. Paramount Pictures Corp.*, 20 F.3d 454, 458-59 (11th Cir 1994).

III. Analysis

Generally speaking, an easement is the right in the owner of one parcel of land (known as the "dominant estate"), by reason of such ownership, to the unfettered use of the property of another (known as the "servient estate") for a special purpose not inconsistent with the general property rights of the owner. *See, e.g., Easton v. Appler*, 548 So. 2d 691, 694 (Fla. 3d DCA 1989). Easements may be created by express grant, by implication, or by prescription. *American Quick Sign, Inc. v. Reinhardt*, 899 So. 2d 461, 465 (Fla. 5th DCA 2005). An express easement may be created by way of a grant contained in a deed or other written document. *Id.* at 464-65. An implied easement may arise from an implied reservation in a deed, from a conveyance with reference to a plat or

map showing streets or ways, or as a way of necessity. 20 Fla. Jur. 2d Easements § 25. Once created, an easement is transferred with the dominant estate even if not mentioned in the instrument of transfer. *Behm v. Saeli*, 560 So. 2d 431, 432 (Fla. 5th DCA 1990).

Modern contends that it enjoys express, common law and implied drainage easements within the Refuge. (Doc. 71 at 13). Fish & Wildlife offers five arguments against the existence of such easements, as well as three arguments for dismissal of the suit against it in its entirety. Each of these arguments is addressed below.[7]

A. Plat language

Fish & Wildlife argues that the owners of Titusville Farms did not intend to establish easements for ditches when they set out rights of way for roads in the Plat. (Doc. 215 at 18). Fish & Wildlife's evidence on that score is that a 1917 deed from Titusville Farms that conveyed the land "subject to right of way, as shown by said plat for public roads, and excepting right of way for necessary ditches."

---

[7] Fish & Wildlife first attempts to argue that the term "road" is not ambiguous and can not, as a matter of law, encompass ditches for off-road drainage. (Doc. 215 at 14-17). As Fish & Wildlife notes in its motion (Doc. 215 at 14 n.3), the Court has already ruled that "road" as used in the Plat is ambiguous. (Doc. 70 at 25). The Court declines the invitation to reconsider that finding.

(Doc. 215 at 18). In the view of Fish & Wildlife, this shows that the owners of Titusville Farms distinguished between roads and drainage ditches, and their dedication of roads on the Plat would therefore not have been intended as dedications of off-road drainage ditches. (Doc. 215 at 18). The Court finds that, although this may be evidence of what the Titusville Farms owners meant when they used the term road on the Plat, it is hardly determinative, if for no other reason than the fact that the deed and the Plat were created years apart. Fish & Wildlife has not established its entitlement to summary judgment on this point.

B. Public dedication and acceptance

Modern contends that it, as a member of the general public, has easement rights in the Drainage System because the canals making it up were dedicated in the plat by common law to the public at large. (Doc. 289 at 16). Common law dedication is the setting apart of land for public use. *Brevard County v. Blasky*, 875 So. 2d 6, 10 (Fla. 5th DCA 2004). "To constitute a dedication, whether an express dedication or an implied dedication, there must first be shown a clear intention by the owner, as indicated by his or her words or acts, to offer the land for public use. Thereafter, there must be an acceptance of the dedication by the public." *Id.* The party asserting the existence of the dedication bears the burden of proof and must present "clear and unequivocal" evidence of an intention to dedicate. *Id.* Acceptance of the

dedication need not be formal, but may be implied from the public's improving or repairing the offered area, "or from any other act with respect to the subject matter that clearly indicates an acceptance." *Smith v. City of Melbourne*, 211 So. 2d 66, 68 (Fla. 4th DCA 1968).

In its motion, Fish & Wildlife argues that, even assuming that the plat constituted an offer to dedicate the Drainage System to the public, there is no evidence that Brevard County ever accepted the dedication. (Doc. 215 at 18-20). In response, Modern reasserts its arguments from its own motion for summary judgment, in which it argued the following: that in 1967, Brevard County vacated and abandoned certain portions of the rights-of-way referenced on the Plat (Doc. 292-9); that in 1974, Brevard County's Public Works Division informed Fish & Wildlife that the division would recommend refusal by the Board of County Commissioners of any request that the County vacate (unspecified) rights-of-way in the Refuge[8] (Doc. 291-2 at 2); that in 1978 Brevard County allegedly refused to vacate some rights-of-way because they were dedicated to facilitate drainage in the area[9]; that in 1987, the city of Titusville formally

---

[8] There is no suggestion that Fish & Wildlife ever presented this request to the Board itself or that the Board ever considered whether the County ought to vacate any rights-fo-way in the Refuge.

[9] Modern does not provide a record citation to support this contention. (Doc. 289 at 17).

vacated a portion of the rights-of-way and transferred title to FDOT for improvements to S.R. 50 (Doc. 292-10);[10] and that in 2001, Brevard County opined regarding the rights-of-way that "public drainage is routed through and is dependent on existing conveyances in the Refuge."[11] (Doc. 289 at 17-18). Finally, Modern argues that Brevard County's refusal to vacate the Plat implies that Brevard claims an interest in it. (Doc. 289 at 18). The evidence Modern offers is, at best, ambiguous. For example, the county's act of vacating rights of way is consistent with having previously accepted the dedication, but it is equally consistent with a willingness to "sign away," for purposes of clearing title, property rights that the county never possessed (or believed it possessed). Despite its evidence not being determinative, however, Modern has provided sufficient evidence to survive summary judgment on this point.

C. Rerouting of implied easement

Florida law provides that an owner of a lot who purchases property in reliance on a plat showing

---

[10] It is not clear what property rights the transaction involved. The resolution accomplishing the transaction (Doc. 292-10 at 2) does not describe the property in detail, and key portions of the accompanying deed (Doc. 292-10 at 3-4) are illegible. As such, the Court cannot discern how this transaction might support Modern's argument that an acceptance of the Drainage System occurred.

[11] Modern does not provide a record citation to support this contention. (Doc. 289 at 18).

streets running through the subdivision acquires a private implied easement over such streets shown in the plat which reasonably benefit the owner's land. *Enos v. Casey Mountain, Inc.*, 532 So. 2d 703, 705 (Fla. 5th DCA 1988). In some cases where it has been determined that a party is entitled to such an implied easement, courts have rerouted the easement to a location other than that specified on the plat. In *Casey Mountain*, for example, the plaintiff had been using a particular path to access its property, mistakenly thinking that the path ran across a platted easement. *Id.* at 706. The actual platted easement was located some distance away from the path the plaintiff was using, and the defendant had built "valuable improvements" – such as landscaping and part of a conference center – across the platted easement. *Id.* The Fifth District Court of Appeals held that the plaintiff was entitled to an implied easement, but that it would be inequitable to require removal or demolition of the improvements built by the defendant. *Id.* As such, the court remanded the case to the trial court with directions to "relocate and establish a substitute implied easement" for the plaintiffs. *Id.*

Fish & Wildlife contends that the Refuge "is an important environmental resource which is certainly as important as the structures blocking the platted easements" in *Casey Mountain*, and therefore "any implied easement for the alleged drainage ditches would have to be routed around the Refuge rather than through the Refuge". This argument fails for

several reasons. First, there is no showing that Fish & Wildlife has built any "valuable improvements," such as buildings, on the Refuge. Second, there has been no showing that utilization of the Drainage System by Modern would necessarily harm the Refuge in a manner analogous to the destruction of the improvements in *Casey Mountain*. Most problematic, however, is that Fish & Wildlife is asserting a right to shift any implied easement off its own property and onto that of some third party. Fish & Wildlife has not pointed to any case law that would permit such an inequitable result.

D. Easements by way of predecessors' deeds

Modern contends that it has an easement appurtenant in the Drainage System pursuant to deeds from its predecessors in interest. (Doc. 289 at 19). Two of the deeds at issue – the 1915 and 1917 deeds – provide that the conveyances are "subject to right of way, as shown by said plat for public roads, and excepting rights of way for necessary ditches." (Doc. 215 at 22-23). Fish & Wildlife notes, however, that an exception is not intended to create a property right; rather, an exception severs some part of the property right being granted. *See, e.g., City of Jacksonville v. Shaffer*, 144 So. 888, 890 (Fla. 1932). A reservation, on the other hand, "is the creation in behalf of the grantors of a new right issuing out of the thing granted, something which did not exist as an independent right before the grant." *Id.* Fish &

Wildlife argues that because the deeds described exceptions rather than reservations, they could not have created easements. (Doc. 215 at 23).

However, the distinction between an exception and a reservation is not as definitive as Fish & Wildlife would have it. Florida courts recognize that, although there is a technical distinction between an exception and a reservation, "the use of one or the other of the terms is not conclusive as to the nature of the grant." *Copello v. Hart*, 293 So. 2d 734, 737 (Fla. 1st DCA 1974). Rather, the technical meaning of the term used "must yield to the manifest intention of the parties." *Id.* Fish & Wildlife offers no argument regarding the intent of the parties and therefore is not entitled to summary judgment on this point.

More effective is Fish & Wildlife's argument that the 1915 and 1917 deeds are too ambiguous in regard to the property right conveyed. Under Florida law, a deed or other instrument must describe the property such that it is evident that a particular parcel, and not a different or unspecified one, is to be conveyed. *Mendelson v. Great Western Bank, F.S.B.*, 712 So. 2d 1194, 1196 (Fla. 2d DCA 1998). "The rule is that a description is sufficient if, by relying on the description read in light of all the facts and circumstances referred to in the instrument, a surveyor could locate the land." *Id.* But if the instrument's description of the property is patently ambiguous, and the instrument furnishes no other information from which the parties' intention can be gleaned, the attempted conveyance is void, and parol evidence

may not be employed to cure the deficiency. *Id.* In the instant case, the description "necessary ditches" is clearly insufficient on its own to identify the drainage easement(s) allegedly conveyed by the 1915 and 1917 deeds. Modern provides no argument that other facts and circumstances referred to in the deeds can cure this deficiency – indeed, Modern has not addressed this argument at all in its response.

The third deed upon which Modern relies to establish an easement – the 1957 deed – provides that "the parties mutually have the right to enter on any part of the adjoining lands from time to time for the purpose of keeping the drainage ditches open and to work the roads." (Doc. 215 at 23). Fish & Wildlife contends that this language establishes only a right of ingress and egress, not a drainage easement. In response, Modern adopts its argument regarding the 1957 deed from its motion for summary judgment. (Doc. 243 at 12). In its motion for summary judgment, however, Modern made a different argument. Essentially Modern argued that the language of the 1957 deed and other evidence showed that the Drainage System was in use and necessary when unity of title was severed, therefore creating an implied easement. (Doc. 289 at 20). This unity of title argument, while still available to Modern at trial, does nothing to rebut Fish & Wildlife's argument that the 1957 deed did not itself establish an easement. Fish & Wildlife is entitled to summary judgment on Modern's claims that the language of the 1915, 1917, or 1957 deeds creates an easement.

E. Common law flowage easement

Florida follows what is known as the "reasonable use" rule with regard to surface waters. *Westland Skating Center, Inc. v. Gus Machado Buick, Inc.*, 542 So. 2d 959, 962 (Fla. 1989). "Under this rule, a possessor of land is not unqualifiedly entitled to deal with surface waters as he pleases nor is he absolutely prohibited from increasing or interfering with the natural flow of surface waters to the detriment of others." *Id.* at 961. "Each possessor is legally privileged to make reasonable use of his land even though the flow of surface waters is altered thereby and causes some harm to others. He incurs liability only when his harmful interference with the flow of surface waters is unreasonable." *Id.*

Despite Florida's adoption of the reasonable use rule, an upper landowner in this state continues to enjoy an easement across the lower tract for all naturally occurring surface water so long as the land remains in its natural state. *Id.* at 963. However, when any party improves his land, thereby causing surface waters to damage his neighbor's property, the reasonable use rule applies. *Id.*

Fish & Wildlife, while not denying that Modern, as an upper landowner, possesses a common law easement for natural water flow, denies that such an easement (or the reasonable use rule) applies in this case. (Doc. 215 at 24). Fish & Wildlife contends that its efforts have been confined to restoring the natural flow of water, rather than interfering with it. (Doc.

215 at 24). Modern responds that the reasonable use rule "applies in this case to preclude [Fish & Wildlife] or anyone else from precluding [Modern] from maintaining the portions of the Drainage System located on the Property to channel impounded waters" and adds that it has the right "to channel waters off the Property, through the Refuge – as a common law flowage easement or under the reasonable use rule – and into the St. Johns River." (Doc. 243 at 14). Even if true, these arguments are not responsive to Fish & Wildlife's argument that it has done nothing to interfere with the *natural* flow of water off the Property. **Fish & Wildlife is entitled to summary judgment on this point.**

F. Failure to join indispensable parties

Rule 19(a) of the Federal Rules of Civil Procedure requires the joinder, if feasible, of certain parties (1) if complete relief cannot be afforded in their absence or (2) if they claim an interest relating to the subject of the suit that may be impaired in their absence or that might expose a party to a substantial risk of inconsistent obligations. Fish & Wildlife contends that the drainage easements claimed by Modern extend into numerous properties aside from those owned by the current parties, and argues that those additional property owners are all indispensable parties. (Doc. 215 at 25-26). However, Fish & Wildlife has not made a showing that these additional property owners will necessarily be bound by the results of these proceedings, and therefore there is no

showing that these other property owners have rights that may be impaired in their absence. Fish & Wildlife has failed to show that these additional property owners are indispensable parties.

C. Statute of limitations

The Quiet Title Act ("QTA") has a twelve-year statute of limitations, which begins to run when the plaintiff or the plaintiff's predecessor in interest knew or should have known of the government's claim to the property at issue. 28 U.S.C. § 2409a(g). Fish & Wildlife contends that Modern's predecessors in interest must have seen the government's "No Trespassing" signs along the borders of the Refuge and must have noticed the government's efforts to plug and otherwise interfere with the Refuge's drainage ditches, including the Hacienda Road ditch and other lateral canals, all of which occurred prior to 1980. (Doc. 215 at 27-28). However, questions of fact such as what signs a non-party saw or should have seen 25 years ago, are particularly ill-suited for resolution by way of a motion to dismiss or motion for summary judgment.

H. Inferred tort claims

Fish & Wildlife complains that, while Modern is seeking to have this Court declare that it interfered with Modern's drainage easements, the proper remedy for such interference under Florida law is an action in tort. (Doc. 215 at 30). Further, Fish &

Wildlife contends that any tort claims Modern might have against it are precluded for procedural reasons. (Doc. 215 at 30). The Court need not resolve Fish & Wildlife's procedural argument. Modern is asserting a Quiet Title Act claim, not a tort claim. To the extent that the Quiet Title Act permits the sort of declaration Modern now seeks – a point neither party has addressed – Modern's failure to meet the procedural requirements for a tort claim is no bar. To the extent such an adjudication is only available in tort, there is no claim to dismiss, as Modern has not raised a tort claim.

IV. Conclusion

In consideration of the foregoing, the motion to dismiss or, in the alternative, for summary judgment (Doc. 215) filed by Defendant United States Fish & Wildlife Service is **GRANTED IN PART** and **DENIED IN PART**, as detailed above.

DONE and **ORDERED** in Chambers, Orlando, Florida on August 16, 2006.

/s/ Greg Presnell
GREGORY A. PRESNELL
UNITED STATES
DISTRICT JUDGE

Copies furnished to:

Counsel of Record
Unrepresented Party

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

MODERN, INC., and FIRST OMNI SERVICE CORP.,

Plaintiffs,

-vs-

STATE OF FLORIDA, DEPARTMENT OF TRANSPORTATION, ST. JOHNS RIVER WATER MANAGEMENT DISTRICT, and UNITED STATES FISH & WILDLIFE SERVICE,

Defendants.

Case No. 6:03-cv-718-Orl-31KRS

ST. JOHNS RIVER WATER MANAGEMENT DISTRICT,

Third Party Plaintiff,

vs.

THE GREAT OUTDOORS PREMIER R.V./GOLF RESORT, INC.,

Third Party Defendant.

ORDER

(Filed Jun. 8, 2006)

This matter comes before the Court after a hearing on the Motion for Summary Judgment (Doc. 289) filed by the Plaintiffs, Modern, Inc. and First Omni Service Corp., and the responses to that motion filed by Defendants State of Florida Department of Transportation ("FDOT") (Doc. 242), St. Johns River Water Management District ("St. Johns") (Doc. 297), and the United States Fish & Wildlife Service ("Fish & Wildlife") (Doc. 298).[1]

I. Background

The Plaintiffs – henceforth referred to as "Modern" for ease of reference – and Defendants St. Johns and Fish & Wildlife own or manage real estate in the area of the intersection of Interstate 95 ("I-95) and State Road 50 ("S.R. 50") near Titusville. Modern owns several parcels (collectively, the "Property") that are located, in general terms, adjacent to I-95 north of the intersection. (Doc. 292). According to Modern, the three tracts it owns total approximately 142.5 acres of

---

[1] Modern initially filed its motion for summary judgment at Docket entry 206. St. Johns initially filed its response at Docket entry 240, FDOT filed its response at Docket entry 242, and Fish & Wildlife filed at Docket entry 251. By Order April 7, 2006 (Doc. 288), the Court required Modern, St. Johns and Fish & Wildlife (but not FDOT) to refile their respective papers, leading to FDOT's response (Doc. 242) having a lower docket number than Modern's motion (Doc. 289), to which it responds.

land. (Doc. 71 at 3). The approximately 6,200-acre St. Johns National Wildlife Refuge (the "Refuge") is located to the west and north of the Property.[2] (Doc. 251 at 4). The federally owned Refuge is managed by Fish & Wildlife. (Doc. 298 at 2). St. Johns owns and manages two parcels of conservation land – the Seminole Ranch and the Canaveral Marsh – which abut the Refuge on portions of its western and southern boundaries, respectively. (Doc. 298 at 2-3). The Seminole Ranch and Canaveral Marsh are owned and managed by St. Johns. (Doc. 289 at 2-3).

The Property and the Refuge were, at one time, part of the Titusville Fruit and Farm Lands Subdivision ("Titusville Farms"), which was platted in the early 1900s.[3] (Doc. 289 at 3). The natural sheet flow of water on the Titusville Farms was generally from the northeast to the southwest, toward the St. Johns River, which passes near the southwest corner of the Refuge. (Doc. 289-4 at 2) Over the years various canals were excavated on the Titusville Farms land to redirect the natural flow of surface water and drain it

---

[2] The Refuge actually consists of two non-adjacent parcels – the Highway 50 Unit, which lies to the west and north of the Property, and the Beeline Unit, which is located far to the south of the Property. (Doc. 251 at 4-5). The Beeline Unit is not relevant to this dispute, and therefore the term "Refuge" in this opinion will refer only to the Highway 50 Unit.

[3] The date of the platting is in dispute. Modern contends it occurred in 1911. (Doc. 289 at 3). Fish & Wildlife contends that the plat shows on its face that it was recorded in 1914. (Doc. 251 at 2).

more efficiently. Modern refers to these canals as the "Drainage System."[4] (Doc. 289 at 4).

In the 1970s, Fish & Wildlife began acquiring portions of Titusville Farms, creating the Refuge in an (ultimately unsuccessful) effort to save the endangered Dusky Seaside Sparrow. (Doc. 289 at 7). Around the same time, St. Johns began acquiring property in and around Titusville Farms to protect the St. Johns River. (Doc. 289 at 8). Over time, both Fish & Wildlife and St. Johns have taken steps such as filling in canals – or allowing others to fill them in – that have reduced the efficiency of the drainage on the land they manage and own, respectively. (Doc. 289 at 10-12).

The record is not entirely clear, but it appears that Modern acquired the Property via a series of transactions in the 1990s. (Doc. 71 at 19-82). In 1996, Modern began complaining to St. Johns of flooding, allegedly caused by restriction and plugging of canals in and around the Refuge. (Doc. 292). After a series of meetings between Modern and Brevard County, FDOT and Fish & Wildlife, a deal was worked out to have some canals that bordered the Refuge altered in

---

[4] Modern does not specify the locations or completion dates of the canals that it believes are or were part of the Drainage System. While reserving judgment as to whether a "Drainage System" ever existed, the remainder of this opinion will utilize that term to refer to the drainage canals that now exist or existed at some time after 1911 on the land constituting Titusville Farms.

an effort to eliminate the flooding of the Property. (Doc. 292-4 at 2).

In February 1997, Modern performed what it described as maintenance of some ditches on and near the Property in an attempt to alleviate the flooding. (Doc. 289 at 14). Shortly thereafter, Fish & Wildlife discovered that hundreds of acres of Refuge wetlands north of the intersection of S.R. 50 and I-95 had begun drying up. (Doc. 292-5 at 2). St. Johns concluded that Modern's ditch work went far beyond mere "maintenance" and had resulted in the draining. (Doc. 292-6 at 2-3). St. John's authorized Fish & Wildlife to construct two weirs to stop the draining and filed an administrative complaint seeking to have Modern undo the ditch work and restore the Refuge wetlands. (Doc. 292-6 at 3). Modern fought these measures, but in 2001 the First District Court of Appeal sided with St. Johns, upholding its determinations.[5] (Doc. 292-6 at 3).

Modern had filed suit in state court in 1997, seeking damages for the flooding under a number of theories. (Doc. 71 at 8). The state court dismissed the complaint and held the suit in abeyance until Modern exhausted its administrative remedies. (Doc. 71 at 8). After the decision of the First District Court of Appeals, Modern reinstituted its damages suit, which was subsequently removed to this Court. (Doc. 1).

---

[5] Modern contends it had "substantially completed" the restoration by July 2003. (Doc. 289 at 15).

Modern, now proceeding under its Fourth Amended Complaint, makes inverse condemnation claims against St. Johns (Count I) and FDOT (Count II), requests a declaratory judgment as to its drainage easement rights in the land controlled by those defendants (Count III), seeks to quiet title under federal law (28 U.S.C. § 2409a) against Fish & Wildlife (Count IV), and finally, in the alternative, demands permanent injunctive relief to prevent St. Johns and FDOT from interfering with the operation of the drainage ditches and requiring them to abate the flooding of the Property (Count V). (Doc. 71).

Modern now moves for summary judgment on Counts III and IV (Doc. 289 at 16-22), partial summary judgment as to its inverse condemnation claims (Counts I and II) (Doc. 289 at 23-24), and summary judgment as to certain defenses and affirmative defenses raised by St. Johns and Fish & Wildlife. (Doc. 289 at 26-30).

II. Standards

A party is entitled to summary judgment when the party can show that there is no genuine issue as to any material fact. Fed.R.Civ.P. 56(c). Which facts are material depends on the substantive law applicable to the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The moving party bears the burden of showing that no genuine issue of material fact exists. *Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 608 (11th Cir. 1991).

When a party moving for summary judgment points out an absence of evidence on a dispositive issue for which the non-moving party bears the burden of proof at trial, the nonmoving party must "go beyond the pleadings and by [his] own affidavits, or by the depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial." *Celotex Corp. v. Catrett,* 477 U.S. 317, 324-25 (1986) (internal quotations and citation omitted). Thereafter, summary judgment is mandated against the nonmoving party who fails to make a showing sufficient to establish a genuine issue of fact for trial. *Id.* at 322, 324-25. The party opposing a motion for summary judgment must rely on more than conclusory statements or allegations unsupported by facts. *Evers v. Gen. Motors Corp.*, 770 F.2d 984, 986 (11th Cir. 1985) ("conclusory allegations without specific supporting facts have no probative value").

The Court must consider all inferences drawn from the underlying facts in a light most favorable to the party opposing the motion, and resolve all reasonable doubts against the moving party. *Anderson,* 477 U.S. at 255. The Court is not, however, required to accept all of the non-movant's factual characterizations and legal arguments. *Beal v. Paramount Pictures Corp.*, 20 F.3d 454, 458-59 (11th Cir 1994).

III. Analysis

A. Easements

Generally speaking, an easement is the right in the owner of one parcel of land (known as the "dominant estate"), by reason of such ownership, to the unfettered use of the property of another (known as the "servient estate") for a special purpose not inconsistent with the general property rights of the owner. *See, e.g., Easton v. Appler,* 548 So. 2d 691, 694 (Fla. 3d DCA 1989). Easements may be created by express grant, by implication, or by prescription. *American Quick Sign, Inc. v. Reinhardt,* 899 So. 2d 461, 465 (Fla. 5th DCA 2005). An express easement may be created by way of a grant contained in a deed or other written document. *Id.* at 464-65. An implied easement may arise from an implied reservation in a deed, from a conveyance with reference to a plat or map showing streets or ways, or as a way of necessity. 20 Fla. Jur. 2d Easements § 25. Once created, an easement is transferred with the dominant estate even if not mentioned in the instrument of transfer. *Behm v. Saeli,* 560 So. 2d 431, 432 (Fla. 5th DCA 1990).

Modern offers six different arguments as to why it has easement rights in the Drainage System. Each is addressed below.

1. Common Law Dedication

Modern contends that it has easement rights in the Drainage System because the canals making it up

were dedicated by common law to the public. (Doc. 289 at 16). Common law dedication is the setting apart of land for public use. *Brevard County v. Blasky,* 875 So. 2d 6, 10 (Fla. 5th DCA 2004). "To constitute a dedication, whether an express dedication or an implied dedication, there must first be shown a clear intention by the owner, as indicated by his or her words or acts, to offer the land for public use. Thereafter, there must be an acceptance of the dedication by the public." *Id.* The party asserting the existence of the dedication bears the burden of proof and must present "clear and unequivocal" evidence of an intention to dedicate. *Id.*

> The means generally exercised to express one's purpose or intention to dedicate his lands to the public use are by a (1) written instrument executed for that purpose; (2) filing a plat or map of one's property designating thereon streets, alleys, parks, etc.; (3) platting one's lands and selling lots and blocks pursuant to said plat indicating thereon places for parks, streets, public grounds, etc.; (4) recitals in a deed by which the rights of the public are recognized; (5) oral declarations followed by acts consistent therewith; (6) affirmative acts of the owner with reference to his property, such as throwing it open in a town, fencing and designating streets thereon; (7) acquiescence of the owner in the use of his property by the public for public purposes.

City of Palmetto v. Katsch, 98 So. 352, 353 (Fla. 1923).

Dedication by a developer is, in essence, only an offer to dedicate and requires an acceptance by the public before it becomes effective. *Smith v. City of Melbourne,* 211 So. 2d 66, 68 (Fla. 4th DCA 1968). The acceptance need not be formal, but may be implied from the public's improving or repairing the offered area, "or from any other act with respect to the subject matter that clearly indicates an acceptance." *Id.*

According to Modern, the original developer recorded the Titusville Farms plat (henceforth, "the Plat") in 1911, advertised lots in the Plat with reference to the Drainage System, sold individual lots referenced on the Plat to individual purchasers, and referenced the Plat in deeds to subsequent purchasers, all around the time of the recording of the Plat. (Doc. 289 at 17).

At least some of the types of evidence that Modern relies on here could support a conclusion that the developer intended to dedicate drainage facilities to public use. However, the particular evidence cited by Modern is not strong enough to compel such a conclusion, at least not at the summary judgment stage. The Plat that Modern relies upon does not refer to a Drainage System, or even to "canals" or "ditches". Instead, the Legend of the Plat contains the word "road." (Doc. 70 at 25). In effect, Modern contends that the word "road" in the Plat should be treated as if it included the word "canal" or something similar. (Doc. 289 at 19). The Court has already held that the Plat is ambiguous as to whether its

references to a "road" were also intended encompass drainage facilities. (Doc. 70 at 25-27). Because of this ambiguity – discussed in greater detail below – recording of the Plat and selling lots with reference to it does not constitute "clear and unequivocal" evidence that the developer intended to dedicate the Drainage System to the public.

Modern's evidence that the developer advertised with reference to the Drainage System consists of dozens of pages of what appear to be old newspaper articles and advertisements, which simply indicate that, at some point, drainage ditches were dug somewhere on Titusville Farms.[6] (Doc. 289-17). Even assuming that these old newspaper excerpts would be admissible evidence, and further that they might constitute oral declarations (or acts consistent therewith) or one of the other categories of evidence referenced in *Katsch,* Modern does not point to a single article or advertisement unambiguously demonstrating that the developers intended to dedicate the Drainage System to the public.

Modern's evidence of public acceptance of the alleged dedication is equally tenuous. It consists of

---

[6] As an example, Modern's first two newspaper articles describe a new and improved ditch digging machine that will be used on Titusville Farms. (Doc. 289-12 at 2-3). The first advertisement informs the reader that "Titusville Fruit and Farm Lands Are Selling Fast" and that "Our Big Ditching Machine is on the way and will be operative in a short time." (Doc. 289-12 at 4).

the following contentions: that in 1967, Brevard County vacated and abandoned certain portions of the rights-of-way referenced on the Plat (Doc. 292-9); that in 1974, Brevard County's Public Works Division informed Fish & Wildlife that the division would recommend refusal by the Board of County Commissioners of any request that the County vacate (unspecified) rights-of-way in the Refuge[7] (Doc. 291-2 at 2); that in 1978 Brevard County allegedly refused to vacate some rights-of-way because they were dedicated to facilitate drainage in the area[8]; that in 1987, the city of Titusville formally vacated a portion of the rights-of-way and transferred title to FDOT for improvements to S.R. 50 (Doc. 292-10);[9] and that in 2001, Brevard County opined regarding the rights-of-way that "public drainage is routed through and is dependent on existing conveyances in the Refuge."[10]

---

[7] There is no suggestion that Fish & Wildlife ever presented this request to the Board itself or that the Board ever considered whether the County ought to vacate any rights-of-way in the Refuge.

[8] Modern does not provide a record citation to support this contention. (Doc. 289 at 17).

[9] It is not clear what property rights the transaction involved. The resolution accomplishing the transaction (Doc. 292-10 at 2) does not describe the property in detail, and key portions of the accompanying deed (Doc. 292-10 at 3-4) are illegible. As such, the Court cannot discern how this transaction might support Modern's argument that an acceptance of the Drainage System occurred.

[10] Modern does not provide a record citation to support this contention. (Doc. 289 at 18).

(Doc. 289 at 17-18). Finally, Modern argues that Brevard County's refusal to vacate the Plat implies that Brevard claims an interest in it. (Doc. 289 at 18).

Modern does not provide any evidence of any member of the public informally accepting the alleged dedication by, for example, improving the "road". Modern does not offer any evidence of either of the relevant governmental entities – Brevard County or Titusville – formally accepting the dedication. What little evidence Modern offers is, at best, ambiguous – i.e., conduct such as vacating rights of way that is consistent with having previously accepted the dedication. However, this conduct is equally consistent with a willingness by the governmental entities to "sign away," for purposes of clearing title, property rights that neither actually possessed due to a lack of dedication or acceptance. In short, Modern has failed to show that it is entitled to summary judgment on its claim to easement rights via public dedication.

2. Easement implied by plat

Where a conveyance is made with reference to a plat or map, distinct and independent private rights in other lands of the grantor than those granted may be acquired, by implied covenant, as appurtenant to the premises granted, although they are not of such a nature as to give rise to public rights by dedication." 20 Fla. Jur 2d Easements § 29. For example, when property is conveyed by means of a deed that refers to a plat on which streets, parks, or other open areas are

shown, the buyers acquire an implied private easement with respect to the areas dedicated on the plat. *Easton,* 548 So. 2d at 694 (citing cases). This rule may apply to man-made bodies of water as well as land. *Reiger v. Anchor Post Products, Inc.,* 210 So. 2d 283 (Fla. 3d DCA 1968) (where plat recited that man-made lake had been dedicated "to the joint and several use of the lot owners of lots fronting on said lake," those owners had exclusive implied private easement and could deny public access to lake). The principle of the implied private easement is based on estoppel; prospective purchasers induced to purchase lots in reliance on the grantor's representations regarding open areas referenced to in the plat may bind the grantor to his representations. *Easton* at 694. The extent of an easement implied by a plat depends on the intent of the parties. *Id.* The easement acquired by a conveyance with reference to a plat may be lost by adverse possession. 20 Fla. Jur 2d Easements § 66.

Modern's evidence with regard to the intent of the Titusville Farms developer on this point consists of the same old newspaper articles and advertisements cited in support of the common law dedication argument. (Doc. 289-12). Modern does not attempt to identify the relevant portions of these documents, many of which do not even appear to be relevant to the issue of the developer's intent with regard to the

Plat.[11] Modern also points to "various deeds" that included the following language: "Subject to rights-of-way, as shown by said plat for public roads, and *excepting rights-of-way for necessary ditches.*" (Doc. 289 at 18-19) (emphasis added by Modern). But the italicized language does not in any way suggest that the developer provided drainage easements via the Plat. If anything, it suggests the opposite – that the developer thought that easements for necessary drainage ditches had *not* been provided in the Plat, hence the need to provide for them in the deeds. It might be that the developer was being over-cautious, and was simply reiterating a right that it had intended to grant via the Plat; but even if this were the case, the deed language is not, itself, evidence of that intent. Modern has not shown that it is entitled to summary judgment on this point.

3. Private express easement by plat

As the Court previously observed (Doc. 70 at 25), the legend of the Plat contains several references to "road," without precisely defining what the word is intended to encompass. Without reiterating that

---

[11] A typical article, apparently taken from the July 7, 1911 edition of the *East Coast Advocate*, begins as follows: "C.J. West & Co., of Titusville, is one of our new land companies, and . . . [the firm is] selling the Titusville Fruit and Farm . . . of about 30,000 acres of land a few miles southwest of Titusville. On Sunday . . . the *Advocate* editor and wife had the pleasure of inspecting this fine body of land, with which they were much pleased." (Doc. 289-12).

entire discussion here, the Court found the word "road" was ambiguous as used in the Plat. (Doc. 70 at 26). Therefore, the possibility that the Plat's "road" easements were also intended to encompass drainage easements could not be ruled out, and the Defendants were not entitled to summary judgment. (Doc. 70 at 26-27). Modern now moves for summary judgment that the use of the word "road" in the Plat definitely *did* include the right to drain waters, and that it therefore has a private, express easement right in the Drainage System described in the Plat. (Doc. 289 at 18).

Modern first contends that the term "road right of way" necessarily includes the right to maintain drainage facilities such as ditches, canals and levies. (Doc. 289 at 19). But the Plat does not contain the term "road right of way," it merely contains the term "road". In addition, the case Modern cites in support of this expansive definition of "road right of way" is construing that term within a particular statute – Fla. Stat. § 73.071 – that is not applicable in this case. *See Joynt v. Orange County,* 701 So. 2d 1249, 1250 (Fla. 5th DCA 1997). Modern does not cite any cases construing the term in circumstances similar to those of the instant case.

Modern raises several other supporting arguments: that the Court must construe the Plat broadly, that Titusville Farms could not have been used for a beneficial purpose without a drainage system, and that because the developer constructed the Drainage System for agricultural purposes, the word "road" on

the Plat must have included the right to drain waters. (Doc. 289 at 19). But Modern does not cite a single item of factual or precedential support for these arguments. Modern has not demonstrated an entitlement to summary judgment as to the interpretation of the word "road" or the existence of a private express easement arising from the Plat.

4. Private express easement by deed

"There are no magical words that one must divine in order to create an express easement. All that is necessary are words showing the intention of the parties to create an easement on a sufficiently identifiable estate." *American Quick Sign,* 899 So. 2d at 465. An easement appurtenant is one that benefits the dominant estate and helps the landowner in his physical use of the land benefitted. *Behm* at 432.

Modern contends that it has an easement appurtenant in the Drainage System pursuant to deeds from its predecessors in interest in the Property. (Doc. 289 at 19). In support, Modern makes several factual claims – that the "Drainage System" was designed to benefit the Property, that it did in fact benefit the Property as shown by the existence of a citrus grove and historical publications – without citing to any record evidence to support them. Modern also cites to four deeds (Doc. 289-27, 290-1, 290-4, and 290-5), but does not explain their import or even their location within Titusville Farms. So far as the Court is able to tell, none of the cited information contains "words

showing the intention of the parties to create an easement on a sufficiently identifiable estate," as required by the case law. Modern is not entitled to summary judgment on this point.

5. Private implied easement from 1957 Sun Charm transaction

An easement by implication requires, *inter alia*, unity of title between the dominant and servient estate, followed by a severance. *Kirma v. Norton*, 102 So. 2d 653, 656 (Fla. 2d DCA 1958). The implied easement is held to be necessary to the complete enjoyment of the one estate because of circumstances existing at the time of the severance. *Id.* "Frequently, it is held that a use, to be an implied easement, must have been continuous, apparent, permanent and necessary when the unified title was severed." *Id.* In this context, "apparent" does not necessarily mean "visible," but the use must be something that might be discovered by reasonable inspection. *Id.*

Modern argues, and the Defendants do not dispute, that at least one of its predecessors acquired its interest in what would become the Property pursuant to a warranty deed that contained the following language: "The parties have the right to enter on any part of the adjoining lands from time to time for the purposes of keeping the drainage ditches open and to work the roads." (Doc. 289 at 20-21). Modern attaches aerial photographs (Doc. 290-6) that purportedly demonstrate the existence and use of the Drainage

System at the time of the transaction. However, the photographs' captions indicate they were taken over the course of several decades and, more importantly, their poor reproduction and absence of description or explanation renders them useless for the purpose of establishing the existence of any sort of drainage system at any point in time. Moreover, contrary to Modern's argument, it is not clear that the Drainage System was apparent because people could (allegedly) see it. Someone viewing a drainage ditch on one portion of the Titusville Farms would not necessarily know that it was being used to drain a far distant portion of that same property, or that the purchaser of the distant portion would therefore have a right to continue that use. In addition, Modern's unsupported assertions fall far short of demonstrating that the Drainage System, if it existed, was "necessary" to the enjoyment of the Property. Modern is not entitled to summary judgment on this point.

6. Private common law flowage easement

Florida follows what is known as the "reasonable use" rule with regard to surface waters. *Westland Skating Center, Inc. v. Gus Machado Buick, Inc.*, 542 So. 2d 959, 962 (Fla. 1989). "Under this rule, a possessor of land is not unqualifiedly entitled to deal with surface waters as he pleases nor is he absolutely prohibited from increasing or interfering with the natural flow of surface waters to the detriment of others." *Id.* at 961. "Each possessor is legally privileged to make reasonable use of his land even though

the flow of surface waters is altered thereby and causes some harm to others. He incurs liability only when his harmful interference with the flow of surface waters is unreasonable." *Id.*

Despite adoption of the reasonable use rule, an upper landowner continues to enjoy an easement across the lower tract for all naturally occurring surface water so long as the land remains in its natural state. *Id.* at 963. However, when any party improves his land, thereby causing surface waters to damage his neighbor's property, the reasonable use rule applies. *Id.*

Modern argues that it has the right to "improve the natural flow of surface water to make a more beneficial use of his or her land," *Seminole County v. Mertz,* 415 So. 2d 1286, 1289 (Fla. 5th DCA 1982), including the right to create canals and use other methods to channel the natural flow of surface water into a more efficient drainage system, *Callan v. G.M. Cypher Co.,* 70 So. 841, 844-45 (Fla. 1916). Modern then argues that, because the historical flow of surface water was generally westward through what is now the Refuge toward the St. Johns River, it is therefore entitled to summary judgment as to Counts III (declaratory judgment) and IV (federal quiet title act). (Doc. 289 at 22). Beyond the foregoing, Modern does not specify the basis for this entitlement – such as, for example, by identifying the particular activity that has violated its alleged common law flowage easement.

In their memoranda, St. Johns and Fish & Wildlife do not dispute Modern's assertion that the natural surface water flow in this area is from the Property generally westward through the Refuge. It would therefore follow that Modern has a common law easement along that path for its surface waters. But it does not necessarily follow that Modern is entitled to judgment on Counts III and IV. Modern has made no showing that the Defendants have interfered with the natural flow of waters from the Property. Rather, the activities of which Modern complains – principally the filling – in of drainage ditches – would restore the natural flow of surface water, not impede it.[12] In addition, to the extent that the Defendants' property might be considered to have been improved – and therefore subject to the reasonable use rule – Modern has made no showing that the filling in of ditches or other activities that have allegedly led to flooding of Modern's land was an unreasonable use. Modern is not entitled to summary judgment on this point.

B. Inverse Condemnation

The Florida Constitution provides that "[n]o private property shall be taken except for a public purpose and with full compensation therefor paid to each

---

[12] The Court notes that much of Modern's case is based on an argument that surface waters do *not* naturally flow off its land – hence the need for the Drainage System to make the Property economically viable.

owner or secured by deposit in the registry of the court and available to the owner." Fla. Const. Art. 10 Sect. 6(a). Modern interprets this to mean that, under Florida law, a party is entitled to recover on an inverse condemnation claim when he or she proves that 1.) property 2.) has been taken 3.) for a public purpose 4.) without full compensation.[13] (Doc. 289 at 23). Modern therefore seeks partial summary judgment as to elements 1, 3, and 4 in regard to its inverse condemnation claims against St. Johns (Count I) and FDOT (Count II). Specifically, Modern contends it is entitled to a summary judgment that it has a compensable interest in the Property, that the actions of St. Johns and FDOT were for a public purpose, and that neither of these Defendants have compensated Modern for the taking of the Property.

Modern cites no case law in support of its contention that it is entitled to such a piecemeal summary judgment. Rule 56(c) requires the entry of summary judgment if the pleadings and other materials "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." All Modern has shown here is particular material facts as to which there is (allegedly) no genuine issue. Even if Modern is correct as to the

---

[13] The only case law Modern cites in support of this interpretation – *Loretto v. Teleprompter Manhattan CATV Corporation*, 458 U.S. 419 (1982) – construes the takings clause of the Fifth Amendment of the United States Constitution, not Article X of the Florida Constitution.

facts underlying the three elements it cites, it has not shown entitlement to any judgment. Moreover, Modern's memorandum lacks sufficient evidence and specificity to enable the Court to enter judgment on its behalf. To establish its compensable interest in the Property, Modern must present evidence of its ownership, not merely point to a lack of objections from the Defendants. To establish that actions were taken for a public purpose, Modern must at least identify the particular actions at issue rather than broadly referring in its memorandum to "St. Johns and FDOT's actions described herein". (Doc. 289 at 23). Insofar as St. Johns and/or FDOT agree with the issues raised by Modern here, the proper procedure would be to include them in the statement of undisputed facts rather than relying on Rule 56.

V. Defenses

Modern attacks a number of the affirmative defenses raised by various Defendants, as discussed below.

1. Exhaustion of administrative remedies

In its answer, St. Johns asserts that Modern has failed to exhaust the administrative remedies provided by Chapter 120, Florida Statutes. (Doc. 74 at 9). Modern argues that no administrative process is required for a takings claim once a physical invasion has occurred; that an administrative court has no power to issue the injunctive relief it seeks; and that

an administrative judge lacks the jurisdiction to determine the existence of easement rights. (Doc. 289 at 24). St. Johns does not contest these arguments directly.[14] Instead, it responds that, while it does not believe it can be held responsible under takings law for issuing permits that ultimately resulted in flood damages to the Property,[15] to the extent it could be held so liable, Modern must challenge the issuance of the permits under Chapter 120 to afford St. Johns "the opportunity to correct its permitting decision before being exposed to potential inverse condemnation liability." (Doc. 297 at 16).

St. Johns does not cite any cases that directly support the proposition that it must be given a chance to rescind the permits before being held liable for an inverse condemnation claim based on their issuance. Instead it relies on a line of cases involving government regulations that deprive owners of substantially all use of their property without just compensation. (Doc. 297 at 16 n.16). In such cases, rather than having the regulation struck down as unconstitutional, the government "is forced to choose between paying just compensation to keep the regulation in effect or removing the regulation." *Tampa-Hillsborough*

---

[14] St. Johns concedes that its failure-to-exhaust defense targets only the inverse condemnation claim, not Modern's declaratory judgment claim. (Doc. 297 at 17).

[15] St. Johns is not alleged to have performed any of the construction or ditch-filling that resulted in flooding of the Property.

County Expressway Authority v. A.G.W.S. Corp., 640 So. 2d 54, 57 (Fla. 1994). But the issue here is whether a taking has occurred, not whether St. Johns acted properly in issuing the permits. "It is a settled proposition that a regulation or statute may meet the standards necessary for exercise of the police power but still result in a taking." *Department of Agric. & Consumer Servs. v. Mid-Florida Growers, Inc.*, 521 So. 2d 101, 103 (Fla. 1988). Moreover, a temporary deprivation of substantially all economically beneficial or productive use of land may constitute a taking. *A.G.W.S. Corp* at 58. Therefore, rescission of the permits will not allow St. Johns to entirely avoid any inverse condemnation liability it now faces.

2. Sovereign immunity

Modern argues that the Defendants cannot raise an sovereign immunity defense to an inverse condemnation claim, a request for an injunction for trespass based on flooding, a request for a declaratory judgment as to easement rights, or a quiet title claim under 28 U.S.C. § 2409a. (Doc. 289 at 26). St. Johns concedes or fails to respond to these points, but argues that insofar as Modern's claims might be construed as "tort claims related to the negligent issuance of permits," sovereign immunity would be applicable. (Doc. 297 at 17). As Modern has not raised a negligence claim, sovereign immunity is not applicable, and Modern is entitled to summary judgment on this defense.

3. Issuance of Permit

St. Johns asserts, in its answer, that no cause of action exists "against a regulatory body for a physical interference with property rights that results from the issuance of a regulatory approval that is subject to obtaining all necessary property rights to implement the regulated activity." (Doc. 74 at 9). Modern responds that a government entity "can always be held liable for the appropriation of property through the issuance and approval of discretionary permits." (Doc. 289 at 25). In support of this proposition, Modern cites to the case of *Hillsborough County v. Gutierrez*, 433 So. 2d 1337, 1338 (Fla. 2d DCA 1983), *abrogated on other grounds, First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, 482 U.S. 304 (1987).[16] In *Gutierrez*, the plaintiffs lived on a piece of property that was bordered by a subdivision under construction. *Id.* at 1338. During the construction, Hillsborough County "had the responsibility to the general public to assure that the developer's drainage plan would work effectively for the disposal of all surface drainage water." *Id.* The drainage system was not built according to the plan, and fill material was improperly added to a portion of the subdivision abutting the plaintiffs' property, and

---

[16] The *Gutierrez* court held that the plaintiffs' private property had not been taken because the flooding had been remedied and Florida did not recognize a "temporary" taking. *Gutierrez* at 1338. In *First English*, decided four years later, the Supreme Court recognized a cause of action for temporary taking.

flooding resulted. *Id.* The trial court found that the County was responsible for enforcing construction in accordance with the plan and that its review procedures should have determined that the fill material would block the natural flow of surface drainage water and cause flooding of some of the plaintiffs' property. *Id.* On appeal, the court upheld the judgment against the County that the plaintiffs' land had been taken. *Id.*

The *Gutierrez* opinion does not explain the basis upon which the County was held responsible for the developer's drainage system or for the failure of its review process to catch the fill material issue. Contrary to Modern's argument, the opinion does not even imply that this responsibility was based upon "the issuance and approval of discretionary permits." As such, the *Gutierrez* case does not support Modern's position.[17] Modern has failed to demonstrate an entitlement to summary judgment on this point.

4. Reasonable use

In its answer, St. Johns offers as its third defense its contention that, "[i]n the absence of an express easement for the benefit of [Modern's] lands, the

---

[17] Modern also cites, without elaboration, to *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982) for this proposition, but that case involved a challenge to a state law, not a permit, and therefore it also does not stand for the stated proposition.

filling of the ditches west of Hacienda Road by [Fish & Wildlife] was a reasonable use of the land of [Fish & Wildlife] pursuant to the common law of Florida. A lower-lying landowner is not required under the common law to permit an upper owner to construct artificial drainage works through the lower-lying landowners' property." (Doc. 74 at 10). Modern complains that St. Johns, citing the reasonable use rule, "erroneously claims that Plaintiffs cannot divert surface waters to a downstream landowner through artificial drainage structures." (Doc. 289 at 26). But, as the above-quoted text shows, St. Johns' answer makes no such claim. Modern is not entitled to summary judgment on this point.

5. Statutory immunity

In addition to sovereign immunity, St. Johns asserts in its answer that it is entitled to statutory immunity pursuant to Section 373.443, Florida Statutes, which provides in relevant part that no action may be brought against the state or a district for the recovery of damages caused by the failure of stormwater management systems, dams and similar facilities based upon, *inter alia*, approval of construction permits or issuance of any order relative to maintenance or operation. (Doc. 74 at 10-11). As with its sovereign immunity defense, St. Johns concedes that this statutory immunity is not a defense to a taking claim, but it raises it in the event the Court determines that Modern's claim "involves, at most, negligence in permitting." (Doc. 297 at 18). Again, as

Modern has not raised a negligence claim, St. Johns cannot raise this defense.

6. Failure to Avoid or Mitigate Damages

St. Johns contends that Modern has failed to mitigate damages because it has not applied for permits to excavate drainage ditches and because it has not exhausted its administrative remedies. (Doc. 74 at 11). In its memorandum, St. Johns offers no explanation as to how a failure to apply for permits to dig ditches might constitute a failure to mitigate damages in a takings case. Instead, St. Johns explains that this defense is based upon the same principle as its argument that Modern has failed to exhaust its administrative remedies. The failure to mitigate defense therefore fails for the same reasons as the failure-to-exhaust defense.

7. Abandonment

As its fifth affirmative defense, St. Johns asserts that Modern and its predecessors in interest "abandoned the claimed drainage easement by not maintaining its drainage capability." (Doc. 74 at 11.) As Modern points out in its memorandum, in order to prove abandonment of an easement, the servient owner must show conduct by the dominant owner "outwardly manifesting an intent to no longer use the easement, or conduct inconsistent with the continuance of the easement." *Enos v. Casey Mountain, Inc.*, 532 So. 2d 703, 705 (Fla. 5th DCA 1988). As support,

St. Johns points to the affidavit of Ralph Brown (Doc. 209-29), a St. Johns engineer. According to St. Johns, Brown's affidavit shows "the considerable deterioration of [Modern's] purported 'drainage system' through non-use and raises a material issue of fact in this regard." (Doc. 297 at 19).

Brown's affidavit and accompanying exhibits total 39 pages. St. Johns does not identify the portion(s) that allegedly demonstrate this deterioration. However, a review shows that Brown performed a survey in February 1996 and found that one of the Refuge's primary drainage ditches (known as "NS-1") was "obstructed due to natural siltation and vegetative growth." (Doc. 209-29 at 3). Brown also refers in his affidavit to "occlusion, due to lack of maintenance over a period of about 40 years, of the ditches within the drainage system." (Doc. 209-29 at 3). However, so far as the Court can determine, he does not establish any basis for having personal knowledge as to the ditches' maintenance (or lack thereof) over the preceding decades or as to the amount of occlusion in the various ditches. (Doc. 209-29 at 6). Brown also refers in his affidavit to aerial photographs that allegedly show NS-1 may have been blocked in the early 1970s. (Doc. 209-29 at 8).

In addition, Fish & Wildlife cites to its "1969 Biological Reconnaissance Report," which states that

> Approximately 18.5 miles of drainage ditches are in the area. These ditches are generally quite old, not maintained, 6-15 feet wide, and

> have quite a bit of vegetation in them. None of the ditches opened into the St. Johns River Channel properly but rather terminate at or below the 5 foot contour.

(Doc. 208-17 at 4).[18] Fish & Wildlife also cites to a 1972 report that describes ditches that were built as part of a vegetable production project, which was later abandoned. (Doc. 298 at 17).

The evidence cited by St. Johns and Fish & Wildlife does not raise a genuine issue of material fact as to whether Modern or its predecessor abandoned any drainage easement they might have possessed. Evidence that the ditches making up the Drainage System deteriorated over the years is not the same as evidence that Modern or its predecessors took steps inconsistent with the continuance of an easement or otherwise affirmatively abandoned any easement rights. Moreover, for abandonment of an easement, all elements of an equitable estoppel must exist. *Wiggins v. Lykes Bros., Inc.*, 97 So. 2d 273, 276 (Fla.

---

[18] The Court's resolution of this motion and its responses have been hampered by the parties' failure to cite to exhibits and attachments as they are docketed, rather than as they were filed. For example, the quoted portion of the 1969 Biological Reconnaissance Report was cited as page 13 of Exhibit D to Exhibit 2 to Fish & Wildlife's motion for summary judgment, which is found at Docket number 215. In the docket, however, the quoted material is found at page 4 of Document 208-17. So that chambers staff does not have to pore through dozens of docket entries to determine whether quoted material has actually been made a part of the record, the parties should cite to the material as docketed whenever possible in future filings.

1957). "The essential elements of the doctrine of estoppel are: (1) a representation by the party estopped to the party claiming the estoppel as to some material fact, which representation is contrary to the conditions of affairs later asserted by the estopped party; (2) a reliance upon the representation by the party claiming the estoppel; and (3) a change in the position of the party claiming the estoppel to his detriment, caused by the representation and his reliance thereon." *Jewett v.. Leisinger,* 655 So. 2d 1210, 1212 (Fla. 4th DCA 1995). The evidence cited by St. Johns and Fish & Wildlife does not even arguably address the equitable estoppel elements. At most the evidence shows nonuse. But nonuse alone "does not result in abandonment, and, as a general rule, an easement created by grant or reservation cannot be lost by mere nonuse for any length of time, no matter how great." 20 Fla. Jur. 2d Easements § 64. As the Defendants have failed to raise a genuine issue of material fact in regard to the abandonment defense, Modern is entitled to summary judgment on this point.

8. Adverse Possession

An easement may be terminated by adverse possession for the prescriptive period, which is seven years. 20 Fla. Jur. 2d Easements § 66. Fish & Wildlife contends that Modern's easements "have been terminated by adverse possession by the United States government, including [Fish & Wildlife]". (Doc. 77 at 8). Modern contends that Fish & Wildlife "has never

precluded use of the Drainage System for drainage until [Modern] attempted to clean out that portion of the Drainage System located on the Property." (Doc. 289 at 28). Fish & Wildlife responds with evidence, among other things, that since the 1970s it has posted boundary signs stating that unauthorized entry into the Refuge was prohibited; that it has had locked gates and "Area Closed" signs at each vehicle access point into the Refuge along Highway 50 since 1975; that it installed culverts in the Hacienda Road ditch and controlled its flow of water since 1976; and that it began plugging drainage ditches in the late 1970s. (Doc. 298 at 18). This evidence is sufficient to raise a genuine issue of material fact as to whether Fish & Wildlife extinguished any drainage easement Modern may have possessed via adverse possession. Modern is therefore not entitled to summary judgment on this point.

9. Merger

St. Johns admits that its recently completed title examination work has shown that the doctrine of merger would not apply in this case. (Doc. 297 at 19). Still attempting to assert the defense, Fish & Wildlife complains that Modern's position on this point has internal conflict, in that it is arguing in one section of its motion that unity of title existed and in another section that it never existed. (Doc. 298 at 18-19). However, Modern is not arguing that unity of title never existed. Instead, Modern argues that unity of title did not exist after the Property was severed from the remainder of Titusville Farms – a prerequisite for

the application of the merger doctrine.[19] Modern is entitled to summary judgment on this point.

10. Res Judicata and Collateral Estoppel

St. Johns indicates that its intention in raising these defenses, which were already addressed by the Court in an earlier order (Doc. 70), "is simply to preserve its position . . . for purpose of appeal." (Doc. 297 at 20). St. Johns adds that its position is that Modern's failure to challenge certain permits issued by St. Johns renders those permits "res judicata and not subject to collateral attack herein." (Doc. 97 at 20). In support of this latter point, which was not addressed by the Court's earlier order, St. Johns cites three cases. (Doc. 297 at 20 n. 24). Aside from providing one cryptic quotation, however, St. Johns does not explain how those cases support its argument, or even provide pinpoint citations to the portion(s) of those cases that purportedly address the issue at hand. As such, St. Johns has not shown the existence of a genuine issue of material fact as to these defenses.

Fish & Wildlife – which was not a party to the earlier administrative proceedings – argues that the Eleventh Circuit Court of Appeals has identified

---

[19] "Obviously, a person cannot have an easement in his own land because an easement merges with the title, and it follows that no easement exists so long as there is a unity of ownership of the properties involved." 20 Fla. Jur. 2d Easements § 1.

certain exceptions to the mutuality-of-parties requirement for res judicata or collateral estoppel, rendering summary judgment on these defenses inappropriate. (Doc. 298 at 19-20). However, Fish & Wildlife makes no effort to argue that the instant case fits within one of these exceptions. Modern is therefore entitled to summary judgment as to these defenses.

11. Marketable Record Title Act ("MRTA")

Modern contends that the MRTA cannot operate to extinguish any drainage easement it might have because of Section 712.03(5), which provides that marketable record title will not extinguish

> [r]ecorded or unrecorded easements or rights, interest or servitude in the nature of easements, rights-of-way and terminal facilities, including those of a public utility or of a governmental agency, so long as the same are used and the use of any part thereof shall except from the operation hereof the right to the entire use thereof.

According to Modern, the easement interests in the Drainage System "have been used by various landowners throughout history [and] is still being used by [Modern], by the public, and by other landowners." (Doc. 289 at 30). However, there is at least some evidence – cited in Section 7 – that the various ditches making up the Drainage System were not in use for substantial periods of time, perhaps decades. Because of the existence of a genuine issue of material fact regarding the continued use of the Drainage System,

Modern is not entitled to summary judgment on the MRTA defense.

VI. Conclusion

In consideration of the foregoing, it is hereby **ORDERED** and **ADJUDGED** that the Motion for Summary Judgment (Doc. 289) filed by the Plaintiffs, Modern, Inc. and First Omni Service Corp., is **GRANTED IN PART** and **DENIED IN PART**. Summary judgment in Modern's favor is hereby **GRANTED** as to the defenses of failing to exhaust administrative remedies, sovereign immunity, statutory immunity, failure to mitigate, abandonment, merger, and res judicata/collateral estoppel, as described above. In all other respects, the motion is **DENIED**.

DONE and **ORDERED** in Chambers, Orlando, Florida on June 8, 2006.

/s/ Greg Presnell
GREGORY A. PRESNELL
UNITED STATES
DISTRICT JUDGE

Copies furnished to:

Counsel of Record
Unrepresented Party

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

MODERN, INC., and FIRST OMNI SERVICE CORP.,

Plaintiffs,

-vs-

STATE OF FLORIDA, DEPARTMENT OF TRANSPORTATION, ST. JOHNS RIVER WATER MANAGEMENT DISTRICT, and UNITED STATES FISH & WILDLIFE SERVICE,

Defendants.

Case No. 6:03-cv-718-Orl-31DAB

ORDER

(Filed Apr. 14, 2004)

This cause comes before the Court for consideration on the following:

1) the United States Fish and Wildlife Service's ("USFWS") Motion to Dismiss (Doc. 46), and Plaintiffs' Response in Opposition thereto (Doc. 56);

2) St. Johns River Water Management District's ("St. Johns") Motion to Dismiss (Doc. 47) and Memorandum of Law in Support thereof (Doc. 50);

3) State of Florida, Department of Transportation's ("FDOT") Motion to Dismiss (Doc. 51)[1] and Memorandum of Law in Support thereof (Doc. 52);

4) Plaintiffs' Response in Opposition to St. Johns' and FDOT's Motions to Dismiss (Doc. 57);

5) Attachments filed jointly (Doc. 61); and

6) Plaintiffs' Statement of Scope of Issues Relating to the Hacienda Road Mitigation Project (Doc. 64).

The Court heard oral argument on December 19, 2003 (Doc. 65),[2] following which St. Johns filed a Reply Memorandum (Doc. 67), and Plaintiffs filed a Surreply (Doc. 69).

I. Background

The following facts are gleaned from the Plaintiffs' Third Amended Complaint as well as the administrative and state proceedings' records.

Plaintiffs Modern and Omni own tracts of land ("the Properties") in North Brevard County near the intersection of I-95 and State Road 50. (*See* Doc. 45, Exs. A-E). The Properties originally were part of an area of land platted in 1911 called the Titusville Fruit and Farm Lands Company Subdivision. (*See* Doc. 45,

---

[1] FDOT adopted and incorporated by reference St. Johns' Motion to Dismiss and Memorandum of Law. (*See* Doc. 52 at 2).

[2] A transcript of the hearing was filed at Document 65.

Ex. F).[3] The land – including Plaintiffs' Properties – was traditionally dry and thus suitable for commercial use and development. Plaintiffs allegedly enjoy express and common law easement rights in certain drainage canals and ditches adjacent to their Properties. Allegedly, these drainage easements are necessary to drain the Properties for continued use as drylands.

In the 1970s, in an effort to protect the now-extinct dusky seaside sparrow, USFWS took title to the St. Johns National Wildlife Refuge ("the Refuge").[4] Plaintiffs, allege, however, that USFWS took title to the Refuge subject to existing rights of way and the drainage easements.

In the late 1980s, St. Johns permitted FDOT to fill several miles of drainage canals located in and adjacent to the Refuge's rights of way. FDOT filled these drainage canals to create wetlands in mitigation of the effects of the widening of State Road 50. Plaintiffs allege that neither FDOT nor St. Johns gave them notice prior to filling the drainage canals and that St. Johns failed to consider adequately the offsite effects of this mitigation project, known as the Hacienda Road Project.

---

[3] A blown-up copy of the Plat was filed as Exhibit B to Document 58, the Affidavit of Robert Sprinkle.

[4] The Refuge continues to be an important habitat for fish and wildlife.

Over the years, the capacity of the land to hold water decreased. In the mid-1990s, the Properties allegedly began to suffer from flooding due to increased water levels, rendering certain portions of the Properties unusable and/or diminished in use and value. Thinking that the Hacienda Road Project caused the flooding, Plaintiffs notified St. Johns and FDOT of its intent to file suit for restoration of its drainage easements. An agreement allegedly was reached between private property owners (including Plaintiffs), Brevard County, USFWS, St. Johns, and FDOT, under which *inter alia* Brevard County would clean out a portion of the drainage canal system. In addition, in January 1997, claiming to do "maintenance" work, Modern excavated two ditches on wetlands that allegedly had, in the past, drained the Properties. Modern did not have a permit for this work. Part of the excavation site was on Refuge land and included portions of the Hacienda Road Project. The site is entirely within St. Johns' jurisdiction.

In March 1997, USFWS complained to St. Johns that Modern's excavation was adversely impacting the Refuge's fish and wildlife by draining wetlands. St. Johns investigated the matter, and on May 14, 1997, held a meeting at which it agreed to issue an Emergency Order directing all drainage canal work to cease and ordering blockage of the system to recreate the wetlands. Plaintiffs allege that this meeting was held without notice to them or any other adjacent property owner. St. Johns issued an Emergency Order authorizing installation by USFWS of two earthen

weirs within the Refuge's drainage canal system to return the water elevations to their pre-excavation levels and thus prevent further drainage. (*See* Doc. 50, Attach. B).

On May 29, 1997, Plaintiffs filed petitions for review of the Emergency Order pursuant to Florida Administrative Procedure Act Chapter 120. (Doc. 50, Attach. C). Plaintiffs sought rescission of the Emergency Order, corrective action, and allowance for continued "maintenance" work.

Thereafter, on August 20, 1997, St. Johns filed an administrative complaint and proposed order against Plaintiffs which, if granted, would have required Modern to undo all work on the system and to maintain permanent water levels exceeding a certain elevation. (Doc. 50, Attach. D). A few weeks later, on September 3, 1997, Plaintiffs filed a petition for a formal administrative hearing. (Doc. 50, Attach. E). All of these matters were consolidated into one administrative proceeding in October 1997.

Meanwhile, in May 1997, Plaintiffs filed suit in the Eighteenth Judicial Circuit Court for Brevard County, seeking both an injunction to reopen the drainage ditches and compensation for interference with their drainage easement rights.[5] On January 9,

---

[5] The Court does not have on file the original complaint filed in Circuit Court. However, the administrative record reflects that Plaintiffs had alleged in their Circuit Court complaint "that flooding from the Hacienda Road Project had resulted in

(Continued on following page)

1998, however, the Circuit Court dismissed Plaintiffs' complaint for failure to exhaust administrative remedies and for failure to join USFWS as an indispensable party. (Doc. 50, Attach. F). The Circuit Court also ordered that the suit be held in abeyance pending the administrative outcome. (Doc. 69, Ex. A).[6]

The administrative proceedings thus went forward.[7] The Administrative Law Judge ("ALJ") heard the consolidated cases in June 1998, and on June 15, 1999, issued a thorough and extensive Recommended Order[8] (Doc. 50, Attach. I) essentially ruling on three main issues: 1) whether the issuance and underpinnings

---

an inverse condemnation of [their] property." (Doc. 50, Attach. I at 5). *(See also* Final Order, Doc. 50, Attach. K at 4).

[6] The parties stipulated that holding the matter in abeyance was appropriate. (*See* Doc. 69, Ex. A at ¶ 3).

[7] In March 1998, FDOT intervened in the administrative proceedings. Also consolidated with the administrative proceedings were two petitions filed by Plaintiffs seeking administrative determination of whether certain agency rules and policy statements were valid.

[8] The administrative process pursuant to Chapter 120 is essentially intended to formulate agency action. To do so, the ALJ conducts a hearing and issues a recommended order to the agency. The agency then considers the parties' exceptions to the order and issues a final order. Generally, a hearing officer in a Chapter 120 proceeding lacks jurisdiction to consider constitutional issues. *Gulf Pines Mem. Park, Inc. v. Oaklawn Mem. Park, Inc.*, 361 So. 2d 695, 699 (Fla. 1978); *but see Key Haven Associated Enter., Inc. v. Board of Trustees of the Internal Improvement Trust Fund*, 427 So. 2d 153, 158 (Fla. 1982) (litigant must include equal protection and due process issues related to application of agency action in appeal to district court).

of the Emergency Order were valid; 2) whether Plaintiffs fell within one of three "maintenance" exemptions to the rule requiring a permit for the excavation; and 3) whether St. Johns' use of an agency statement to interpret the term "maintenance" constituted an invalid unadopted rule. Only the first two issues are relevant herein.

In his Recommended Order, the ALJ found that the Titusville Subdivision Plat established a drainage system of intersecting canals. (*Id.* at ¶ 17). The ALJ also found that Modern's excavation caused an emergency (*id.* at ¶ 105) and that there was evidence to support issuance of the Emergency Order as well as its legal and factual underpinnings. (*Id.* at ¶¶ 374-377). Further, the ALJ found that a permit was required for the excavation and that Plaintiffs had failed to obtain this permit. (*Id.* at ¶ 94). Plaintiffs argued that St. Johns was estopped from enforcing permit requirements against them, but the ALJ found that St. Johns did not make any misrepresentations of material fact on which Plaintiffs could have relied to their detriment. (*Id.* at ¶¶ 204-212, 399-402). The ALJ also found as a matter of fact that Plaintiffs were not treated disparately from others with regard to the permit rule. (*Id.* at ¶¶ 213-237).

During the proceedings, St. Johns and FDOT filed a Motion for Protective Order and Motion in Limine seeking to preclude Plaintiffs from discovering and introducing evidence of the Hacienda Road Project and its impact on the contested area. Defendants argued that the administrative body could not

determine the nature or extent of easement rights or any other real property issue. Plaintiffs counter-argued that such evidence was essential to their ability to exhaust their administrative remedies. The ALJ ultimately denied the Motion in Limine and allowed Plaintiffs to discover and introduce evidence regarding the Hacienda Road Project and its role in alleged flooding problems on their Properties. Ultimately, the ALJ found that the Hacienda Road Project did not decrease floodplain storage capacity and did not cause water to flood Plaintiffs' Properties. (*Id.* at ¶¶ 76, 77, 86).

To determine whether Plaintiffs' activities fell within the exemptions to the permit rule, Plaintiffs presented the evidence regarding their alleged easements within the drainage system. The ALJ again found that, even assuming *arguendo* that Plaintiffs had drainage easements, they still were not exempt from statutory permit requirements (*id.* at ¶ 263) and they had not met the requirements for the exemptions. (*Id.* at ¶¶ 419-420). Moreover, the ALJ held that St. Johns' and FDOT's regulations did not impair their use of and rights in those easements.[9] (*Id.* at ¶¶ 404, 407). In making this decision, the ALJ expressly said he lacked jurisdiction to decide the "existence, nature, and extent of the property rights. . . .

---

[9] At the oral argument before this Court, Defendants also assumed *arguendo* that Plaintiffs have drainage easements and agreed that the ALJ lacked authority to determine whether Plaintiffs have easements. (Doc. 65 at 13).

Jurisdiction over such matters lies in the circuit court." (*Id.* at ¶ 403 (citations omitted); *accord id.* at ¶ 423).

With regard to the weirs, the ALJ determined that they were reasonably necessary to protect Refuge life and uses (*id.* at ¶ 135) and that "Neither of the weirs caused flooding or other adverse impacts on nearby property." (*Id.* at ¶ 138). Rather, the ALJ found that the weirs had the same effect on water levels as the high elevation areas had on the Properties pre-excavation. (*Id.*).

Following issuance of the Recommended Order, St. Johns' Governing Board issued its Final Order (Doc. 50, Attach. K), adopting the majority of the ALJ's Recommended Order and concluding in relevant part that the Emergency Order was properly issued and the proposed agency action should be upheld.[10]

Plaintiffs appealed the Final Order to the First District Court of Appeal for the State of Florida. (Doc. 50, Attach. L). In relevant part, Plaintiffs argued that portions of the Recommended Order adopted by the Final Order improperly adjudicated property rights that should have been determined by a circuit court. (*Id.* at 33-37). They further argued that they were entitled to a declaratory judgment from a court of

---

[10] The Final Order struck the ALJ's finding that the Titusville Subdivision Plat established a drainage system of intersecting canals. (Doc. 50, Attach. K at 14).

competent jurisdiction as to the extent of their easements and attendant entitlements. (*Id.* at 39-40).

In response, St. Johns and FDOT argued that the District Court of Appeal should not determine whether Plaintiffs have easement rights. (Doc. 57, Ex. D at 6-7, 33-36). The First District Court of Appeal affirmed the Final Order but without addressing the real property issues. *See St. Johns River Water Mgmt. Dist. v. Modern, Inc.*, 784 So. 2d 464 (Fla. 1st DCA 2001).

Following the administrative proceedings, Plaintiffs filed an amended complaint in Circuit Court, which the Circuit Court dismissed because USFWS was an indispensable party. (Doc. 50, Attach. N). Plaintiffs thus served USFWS, and USFWS then removed the case to this Court.

Plaintiffs thereafter filed in this Court a Second Amended Complaint and a Third Amended Complaint. (Doc. 45). The Third Amended Complaint alleges 12 Counts as follows: (I) Inverse Condemnation of Express Easements against St. Johns; (II) Inverse Condemnation of Express Easements against FDOT; (III) Inverse Condemnation of Real Property against St. Johns; (IV) Inverse Condemnation of Real Property against FDOT; (V) Denial of Equal Protection under the U.S. and Florida Constitutions against St. Johns; (VI) Denial of Substantive Due Process Under the U.S. and Florida Constitutions; (VII) Denial of Procedural Due Process under the U.S. and Florida Constitutions; (VIII) Declaratory Relief; (IX)

Trespass; (X) Nuisance; (XI) Permanent Injunctive Relief; and (XII) Estoppel.[11]

Defendants now separately move to dismiss Plaintiffs' Third Amended Complaint on various grounds addressed below. St. Johns and FDOT also move for summary judgment on Count VIII.

II. Standards of Review

A. Motion to Dismiss

In ruling on a motion to dismiss, a trial court must view the complaint in the light most favorable to the plaintiff, *Scheuer v. Rhodes,* 416 U.S. 232 (1974), and must limit its consideration to the pleadings and any exhibits attached thereto. Fed.R.Civ.P. 10(c). *GSW, Inc. v. Long County, Ga.*, 999 F.2d 1508, 1510 (11th Cir. 1993). The Court will take the Complaint's allegations as admitted by Defendant and liberally will construe them in Plaintiff's favor. *Jenkins v. McKeithen,* 395 U.S. 411, 421 (1969). The Court will not dismiss the Complaint for failure to state a claim unless it appears beyond a doubt that the Plaintiff cannot prove any set of facts that

---

[11] It is not clear from the face of the Third Amended Complaint against whom Counts VI-XII are alleged. The Court therefore assumes, for purposes of this Order, that they are alleged against all Defendants. For this reason, in sections addressing Counts I-V, "Defendants" will be used to refer to St. Johns and FDOT only. Sections addressing Counts VI-XII, which are not alleged against any specific Defendant, will use "Defendants" to refer to all three Defendants, unless otherwise noted.

support a claim for relief. *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957).

B. Summary Judgment

A party is entitled to judgment as a matter of law when the party can show that there is no genuine issue as to any material fact. Fed. R. Civ. P. 56(c). The substantive law applicable to the case determines which facts are material. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986). Summary judgment is mandated "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof." *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986). The moving party bears the burden of proving that no genuine issue of material fact exists. *Id.* at 323. In determining whether the moving party has satisfied its burden, the court considers all inferences drawn from the underlying facts in a light most favorable to the party opposing the motion, and resolves all reasonable doubts against the moving party. *Anderson,* 477 U.S. at 255. If the record presents factual issues, the court must not decide them, but rather, must deny the motion and proceed to trial. *Environmental*

Defense Fund v. Marsh, 651 F.2d 983, 991 (5th Cir. 1981).[12]

III. Analysis

A. Counts I-IV: Inverse Condemnation

1. Res Judicata

Defendants St. Johns and FDOT assert that Plaintiffs elected to pursue their inverse condemnation (or state takings) claims in the administrative proceedings below and therefore are subject to *res judicata*. Specifically, Defendants assert that Plaintiffs lost on the facts with regard to whether the Hacienda Road Project and weir construction caused flooding in the contested area and that, if Plaintiffs wanted to appeal these findings and seek a determination of whether a taking had occurred, they should have done so in the District Court of Appeal. Plaintiffs counter that, as a matter of law, they could not bring their inverse condemnation claims before the District Court of Appeal.

Neither party is entirely correct. The state of the law with respect to inverse condemnation claims and adjudication of the propriety of agency actions stems from *Key Haven Associated Enterprises, Inc. v. Board of Trustees of the Internal Improvement Trust Fund,*

---

[12] All decisions of the Fifth Circuit prior to October 1, 1981, are binding precedent on this Court. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

427 So. 2d 153 (Fla. 1982), and its progeny. It is most easily summarized as follows:

1) If a property owner concedes the propriety of an agency action, the owner may proceed directly to circuit court to pursue an inverse condemnation claim. *Id.* at 156.[13]

2) If a property owner contests the propriety of an agency action but has made an adequate record on the takings issue before the ALJ, the party may appeal the propriety of the agency action and seek adjudication of its takings claim before the district

---

[13] As the Court pointed out in oral argument, *Key Haven* is not as broad as Defendants would have it be. Its essential holding is that, if the litigant wishes to challenge the propriety of an agency action on constitutional grounds, a litigant must do so on direct appeal to the state district court. 427 So. 2d at 158. *Key Haven* further held that, in that case, the plaintiff could have filed an inverse condemnation action in circuit court *after* exhausting all executive branch appeals because the claim was not a "veiled attempt to collaterally attack the propriety of agency action." *Id.* at 159. The Florida Supreme Court wrote:

> once an applicant has appealed the denial of a permit through all review procedures available in the executive branch, the applicant may choose either to contest the validity of the agency action by petitioning for review in a district court, or, by accepting the agency action as completely correct, to seek a circuit court determination of whether that correct agency action constituted a total taking of a person's property without just compensation.

Id. at 156.

court of appeal.[14] *See Lee County v. New Testament Baptist Church of Fort Myers, Fla.*, 507 So. 2d 626,

---

[14] A litigant is not *required* to bring its takings claim as part of an appeal to the district court. In *Albrecht v. State*, 444 So. 2d 8 (Fla. 1984), a case decided subsequent to *Key Haven*, the circuit court had entered judgment on the pleadings against plaintiff's claim for inverse condemnation based on *res judicata*, and the appellate court had affirmed. *Id.* at 10. The Florida Supreme Court disagreed with the circuit and appellate courts, writing that the appellate court improperly presumed that because a (now abrogated) statute *allowed* an inverse condemnation to be brought before the district court of appeal as part of the appellate review of the agency action, that the inverse condemnation claim *had* to be brought before the district court of appeal. *Id.* at 11. "It is too broad a leap to take the words of a statute which provide for remand *if* the action is found to be in violation of the constitution and interpret them to mean that any constitutional issue *must* be raised there or be forever barred." *Id.* The *Albrecht* court noted that its decision did not conflict with *Key Haven*:

> In *Key Haven* we merely provided an alternative to direct review for those parties who wish to accept the propriety of the action. This was not meant to extinguish the property owner's right to bring the separate claim of inverse condemnation in circuit court at the conclusion of all judicial as well as executive branch appeals regarding propriety of the action. Whether the party agrees to the propriety or it is judicially determined is irrelevant. In either case the matter is closed and a claim of inverse condemnation comes into being. . . . once a party agrees to the propriety of the action and chooses the circuit court forum, it is estopped from any further denial that the action itself was proper. . . . This is not to say that once a party chooses to litigate the propriety of the action through the district court that it is estopped from bringing a claim of inverse condemnation in circuit court.

(Continued on following page)

627-28 (Fla. 2d DCA 1987); *see also Key Haven,* 427 So. 2d at 159 ("The claim of the taking of property *can be* raised in this direct review proceeding, and, *if an adequate record is available,* the district court could require the state to institute condemnation proceedings.") (emphasis added) (citations omitted).[15] In this scenario, the ALJ would find the facts, and if raised on appeal, the district court would decide whether a taking had occurred based on the existing record after determining whether the agency action was proper.[16] *Key Haven,* 427 So. 2d at 159.

3) If a property owner contests the propriety of an agency action, the owner may seek review of the

---

Id. at 12-13 (internal citations omitted).

Albrecht and *Key Haven* were abrogated by statute, as explained in *Bowen v. Florida Department of Environmental Regulation,* 448 So. 2d 566 (Fla. 2d DCA 1984). *Bowen* held that Florida Statute § 253.763(2), which allows for an inverse condemnation claim in circuit court, "now provides for proceeding directly to the circuit court on an inverse condemnation action following final agency action denying, on its merits, a permit application." *Id.* at 568.

[15] In *Lee County,* the appellant argued that "*Key Haven* stands for the proposition that an inverse condemnation claim and an appeal from agency action based on the unconstitutionality of the relevant statute or rule cannot be brought in the same action." *Id.* at 627-28. The court disagreed, holding instead that *Key Haven* allowed the district court of appeal to adjudicate a takings claim on review of the agency action *if an adequate record was available. Id.* at 628.

[16] This is so because the propriety of an agency action must be determined finally before a takings claim comes into being. *Albrecht,* 444 So. 2d at 13.

agency action in the district court of appeal and *then* file an inverse condemnation claim in the circuit court. *Albrecht,* 444 So. 2d at 12-13. The property owner may not, however, simultaneously pursue an appeal of the agency action before the district court and a takings action in the circuit court. *Janson v. City of St. Augustine,* 468 So. 2d 329, 330 (Fla. 5th DCA 1985).[17] *See also Bowen v. Florida Dep't of Envtl. Reg.,* 448 So. 2d 566, 570 (Fla. 2d DCA 1984) (expressing in *dicta* that if an administrative appeal has been instituted, a circuit court could not hear the takings issue until the administrative proceedings were complete).

In the instant case, Plaintiffs did not accept the agency action as proper but instead elected to seek review of the propriety of the agency action in the

---

[17] In *Janson,* the plaintiff attempted to appeal the propriety of the agency action while simultaneously pursuing its inverse condemnation claim in circuit court. The court held:

> *Key Haven* and *Albrecht* dictate that the two remedies of appeal and inverse condemnation cannot be *simultaneously* pursued. Although a challenge to the administrative decision via appeal does not extinguish a suit for inverse condemnation at the conclusion of the appeal, *Albrecht,* a filing of an inverse condemnation suit forecloses a party from challenging the correctness of an administrative decision. *Key Haven.*

468 So. 2d at 330. *See also Lee County,* 507 So. 2d at 628 (describing the *Janson* situation as where a party improperly attempted to appeal the propriety of the agency action while simultaneously, *but in a separate lawsuit,* brought an inverse condemnation claim).

District Court of Appeal. Plaintiffs also had on file a separate lawsuit in Circuit Court, alleging inverse condemnation. Because the Circuit Court had held the takings suit in abeyance pending the administrative outcome, Plaintiffs were forbidden from simultaneously pursuing their takings claim in the district court of appeal. *Janson*, 468 So. 2d at 330.

Defendants insist, however, that despite the abeyance, Plaintiffs raised the takings issue in the administrative proceeding and made an adequate record such that Plaintiffs are precluded from raising the issue before this Court. There is no dispute that Plaintiffs alleged in their administrative pleadings that Defendants' conduct effected a taking. There also is no dispute that the ALJ found that neither the Hacienda Road Project nor the weir construction caused flooding in the contested area. Nonetheless, just because something was plead and limited fact findings made at the administrative level does not necessarily mean an issue was litigated for purposes of *res judicata*. The Court finds that the administrative proceedings below did not fully and fairly explore the inverse condemnation claim and all its attendant issues and hence the record was not adequate with regard to whether a taking occurred.[18] Findings

[18] At the administrative proceedings, Plaintiffs indisputably sought to introduce evidence related to the Hacienda Road Project and its impact on the contested area. Plaintiffs indicated that this evidence went to the heart of their claim of whether they were exempt from certain permit requirements. This position is not entirely inconsistent with the position Plaintiffs now

(Continued on following page)

take, for Plaintiffs did not affirmatively argue that the *takings issue* should be adjudicated at the administrative level. Rather, Plaintiffs urged the ALJ to consider "the issue of whether or not we have easement rights and what those easement rights entitle us to do, and the impact of [St. Johns'] action on those easement rights." (Doc. 57, Ex. B at 65). In other words, Plaintiffs contended that their easement rights obviated the need to obtain a permit. (*Id.* at 69-70).

Defendants do not dispute that the ALJ lacked authority to determine whether Plaintiffs had easements. (Doc. 65 at 13). But, unlike Plaintiffs, Defendants do take a position inconsistent from the position espoused at the administrative proceedings. While arguing their Motion in Limine, for example, St Johns said:

> There are issues to adjudicate here Administratively that don't deal with the taking issue, involving whether or not the activity that is alleged required a permit or not, whether one was received or not, and those are purely Administrative issues that are within the scope [for] . . . Your Honor to consider. . . . it's not a defense to assert that they may or may not have some private property right to drain over someone else's lands. It's simply immaterial in any event.

(Doc. 57, Ex. B at 68). Similarly, FDOT said:

> Your Honor, we have an inverse case that's ongoing in Circuit Court in Brevard County. Now, in that inverse case, the Petitioners want to assert that the Agency's action is inappropriate. . . . The proper place to litigate that is in an Administrative context. What they want to do is they want to sidestep the Administrative process and step into Circuit Court, assert that the Agency action is wrong and get the Court to determine that a taking has occurred. Now, they can't do that. That was part of the issues raised by us in the Circuit Court. So, we're saying they are challenging the Agency action and it's appropriate. Under the case law, they must first exhaust their administrative remedies. . . . [they must] Administratively challenge that action and have a determination of whether the action

(Continued on following page)

regarding the Hacienda Road Project, weir construction, and flooding related thereto were not made in the context of inverse condemnation but rather only to set the stage for the ALJ's determination regarding the propriety of the Emergency Order and any potential exemptions to the permit rule.

Moreover, as noted in *Atlantic International Investment Corporation v. State,* 478 So. 2d 805 (Fla. 1985) (*per curiam*) – a case almost on all fours with

---

> was correct or incorrect and then proceed forward with that at that time. That's the appropriate time to proceed on the Circuit Court, whether when that appropriate agency action then constitutes a taking.

(*Id.* at 62-64). FDOT also said "A 120.57 proceeding is designed to challenge Agency action. It is not designed to determine whether someone does or does not have rights to some interest in land." (*Id.* at 71-72). And later FDOT argued:

> [Plaintiffs] went into Circuit Court and they asked the Circuit Court to decide all these things and he said, no, this is not the place. [They had] to challenge Agency action Administratively first. And then, based on that decision, based on whether it was correct or not, then we go to decide the taking or whether a temporary injunction should be issued or not.

(*Id.* at 73). (To whom FDOT was referring by saying "we" is unclear.) Ultimately, the ALJ allowed in the evidence but only to determine limited permit exemption issues, not to adjudicate property rights or a takings claim, both of which an agency may not adjudicate in any event. "Inverse condemnation actions cannot be adjudicated by administrative boards or agencies." *Bowen,* 448 So. 2d at 568; *see also Buckley v. Dep't of Health and Rehab. Services,* 516 So. 2d 1008, 1009 (Fla. 1st DCA 1987) (administrative hearing improper forum to determine property issues).

the instant matter – the property owner was not barred "from bringing a taking claim in circuit court when that taking issue has not been addressed or resolved *in the district court.*" *Id.* at 808 (emphasis added). In the instant case, as Defendants recognize, Plaintiffs did not pursue the takings claim before *the district court* on appeal.[19] Hence, the inverse condemnation claim is not barred by *res judicata.*[20]

---

[19] There is no dispute that Plaintiffs did not pursue the takings issue on appeal. "Having taken the parties' and the ALJ's time to pursue these matters, and having had findings of fact regarding their contentions made against them, plaintiffs could not then abandon their taking claim and reserve it for another day by declining to pursue it further in the appellate part of the administrative process." (Doc. 50 at 17) (citations omitted). Defendants stated at oral argument:

> They pursued the taking claim [before the ALJ]. They lost on the facts. Had they wanted to pursue it on appeal, they would have had to first say that these facts are not supported by competent substantial evidence, the facts of no flooding, and then raised their taking claim. It was obvious that they couldn't maintain a claim that they weren't supported by competent substantial evidence. . . . So the point is you cannot start down a process, raising a takings claim, and then abandon it in mid-stream once the factual record is not there. . . . I can't cite a case to you that says specifically that. It has not come up before.

(Doc. 65 at 21).

[20] The cases cited by Defendants do not aid their position. For instance, *Wiregrass Ranch, Inc. v. Saddlebrook Resorts, Inc.*, 645 So.2d 374 (Fla. 1994), held that a party may not unilaterally terminate the jurisdiction of the administrative agency in a proceeding "clearly within an agency's area of responsibility and jurisdiction as directed by the legislature." *Id.* at 376. In the

(Continued on following page)

Indeed, to establish *res judicata,* there must be identity of: 1) the thing sued for; 2) the cause of action; 3) the persons or parties to the action; and 4) the quality or capacity of the person for or against whom the claim is made. *Fields v. Sarasota-Manatee Airport Auth.,* 953 F.2d 1299, 1307-08 (11th Cir. 1992). If the second suit is based upon the same parties and the *same* causes of action, the prior judgment serves as an estoppel to all issues actually litigated and all issues that *could have been* litigated. *Agripost, Inc. v. Miami-Dade County,* 195 F.3d 1225, 1232 (11th Cir. 1999); *Albrecht,* 444 So. 2d at 12. If the second suit is based upon the same parties but *different* causes of action, then "the prior judgment will not serve as an estoppel except as to those issues actually litigated and determined in it." *Albrecht,* 444 So. 2d at 12. To determine whether the cause of action is the same, a court must ask whether "the facts or evidence necessary to maintain the suit are the same in both actions." *Id.* (citations omitted).

In the instant case, the facts and evidence necessary to maintain the two suits are not the same. *Lake Lucerne Civic Ass'n v. Dolphin Stadium Corp.,* 878 F.2d 1360, 1371 (11th Cir. 1989) (citing with approval *Dade County v. Nat'l Bulk Carriers,* 450 So. 2d 213 (Fla. 1984), for its recognition of *Albrecht*'s holding

---

instant case, Defendants have conceded, as they must, that the administrative hearing officer and agency lack authority and jurisdiction to make conclusions of law regarding the takings issue.

"that a claim of uncompensated taking constitutes a *separate and distinct* cause of action from an action challenging the propriety of an agency's action in denying a permit. . . ."). *Atlantic Int'l*, 478 So. 2d at 807-08 (citing with approval *Albrecht*). As *Albrecht* noted, the facts necessary to maintain a takings action differ from the facts needed to determine the propriety of an agency action. 444 So. 2d at 12. To prevail on a takings claim, the plaintiff must show diminution of property value and no alternative economically reasonable uses, whereas those showings are irrelevant to determining whether an agency action was proper. *Id.*; *Graham v. Estuary Prop., Inc.*, 399 So. 2d 1374, 1380-81 (Fla. 1981) (setting forth factors to consider when determining whether a taking has occurred). Because the causes of action are different, *res judicata* prevents relitigation of only those issues actually litigated. As determined above, inverse condemnation and its attendant issues were not actually litigated and hence *res judicata* does not bar Plaintiffs' inverse condemnation claims.

2. Collateral Estoppel

Defendants allege that, even if Plaintiffs' inverse condemnation claims are not barred by *res judicata*, Plaintiffs should be collaterally estopped from attacking factual findings related to the Hacienda Road Project and weir construction. Collateral estoppel prevents the same parties from relitigating issues that have previously been litigated and determined. *Agripost*, 195 F.3d at 1229 n.7; *Carlisle v. Phenix City*

Bd. of Educ., 849 F.2d 1376, 1379 (11th Cir. 1988) ("Collateral estoppel . . . depends on whether the . . . issue was litigated and decided in the state judicial proceedings."); *Porter v. Saddlebrook Resorts, Inc.*, 679 So. 2d 1212, 1214-15 (Fla. 2d DCA 1996). This doctrine applies only if: 1) the identical issues were presented in the prior proceeding; 2) there was a full and fair opportunity to litigate the issues in the prior proceeding; 3) the issues in the prior litigation were critical and necessary to the prior determination; 4) the parties were identical; and 5) the issues were actually litigated in the prior proceeding. *Porter*, 679 So. 2d at 1214-15. In *Porter*, the court found that even though the issue was discussed in the final order and certain findings made thereon, the issue was not essential to the agency's final action and hence the issue was not litigated in the prior proceeding for purposes of collateral estoppel. *Id.* at 1215 ("the findings on that issue should not be used for purposes of collateral estoppel.").[21]

Similarly, in this case, even though the ALJ discussed whether the Hacienda Road Project and weirs caused flooding and made findings thereon, those findings were not necessary and critical to the broader issues of whether the excavation caused an emergency, whether the Emergency Order was valid,

---

[21] The Court notes, by way of semantics, that collateral estoppel prevents relitigation of *issues*. Even though certain factual findings are made, that does not necessarily mean that an *issue* was fully litigated.

and whether Plaintiffs fell within certain rule exemptions.[22]

The Court finds that the Plaintiffs are not collaterally estopped from attacking factual findings related to the Hacienda Road Project and its impact because those findings were not critical and necessary to the disposition of the administrative proceeding. *Albrecht,* 444 So. 2d at 12 (holding that estoppel did not bar the inverse condemnation claim because the facts and issues were not actually litigated in the prior proceedings).

3. Separate Counts for Taking of Easements and Taking of Real Property

Defendants assert that Plaintiffs cannot allege a taking of a drainage easement in a separate count from a taking of real property. Defendants are correct, for making out a successful claim of a taking of a drainage easement depends on a finding that Defendants' conduct rendered Plaintiffs' land useless and

---

[22] This is so despite Plaintiffs' argument below that easement rights and evidence regarding the Hacienda Road Project were relevant and necessary to the administrative proceedings.

On this issue, both Defendants and Plaintiffs argued positions that are different from the positions taken herein. Plaintiffs argued that the Hacienda Road Project and its impact were relevant and crucial to their claims, whereas Defendants argued it was not. Ultimately, the actual findings make clear that *regardless* of this evidence, Plaintiffs were not exempt from permit requirements and hence the ALJ implied that, in the end, the evidence was irrelevant to the broader issue.

permanently deprived Plaintiffs of all beneficial enjoyment thereof. *Leon County v. Smith,* 397 So. 2d 362, 364 (Fla. 1st DCA 1981) (*per curiam*) (upholding trial court's finding that a taking of an easement resulted from flooding "which rendered the land useless and permanently deprived plaintiffs of all beneficial enjoyment thereof."). Indeed, a person can be deprived of the use of a drainage easement but without damage, the litigant would have no cause of action. The damage resulting from the deprivation of a drainage easement *is* damage to the real property allegedly drained. For this reason, the causes of action are not separable, and Plaintiff must replead them as one.[23]

4. Ripeness

Defendants move to dismiss Plaintiffs' takings claims to the extent they relate to a permit denial. Specifically, Defendants contend that, because Plaintiffs never sought a permit for their actions, their claims related thereto are not yet ripe. Plaintiffs are not, however, suing for relief from denial of a regulatory permit but rather for physical invasion of their

---

[23] Clearly, a cause of action for a taking of an easement exists. *See, e.g., City of Miami Beach v. Belle Isle Apt. Corp.*, 177 So.2d 884, 886 (Fla. 3d DCA 1965). There is no case law, however, to support Plaintiffs' position that the cause of action for a taking of a drainage easement can exist separate and apart from a cause of action for a taking of the real property that the drainage easement benefits.

property interests, regardless of a permit. For this reason, Plaintiffs' claims are ripe for adjudication.

B. Counts V: Equal Protection

A. Res Judicata

Defendants assert that Plaintiffs' federal equal protection claims are barred by *res judicata*. Plaintiffs argue that the ALJ and agency had no power to adjudicate their constitutional claims and that they deserve a trial court's ruling.

A hearing officer in a Chapter 120 proceeding may not adjudicate certain constitutional issues. *Skinholster v. Graham*, 527 F. Supp. 1318, 1321-22 (N.D. Fla. 1981) (citing *Curtis v. Taylor*, 648 F.2d 946 (5th Cir. 1980); *Gulf Pines Mem. Park, Inc. v. Oaklawn Mem. Park, Inc.*, 361 So. 2d 695, 699 (Fla. 1978) ("administrative hearing officer lacks jurisdiction to consider constitutional issues") (citation omitted); *Department of Admin., Div. of Pers. v. Dep't of Admin., Div. of Admin. Hearings*, 326 So. 2d 187, 189 (Fla. 1st DCA 1976) (neither a hearing officer nor an agency has authority to declare an agency rule unconstitutional on equal protection or due process grounds).[24] However, as noted above, *Key Haven* ruled that, where a litigant asserts that the agency applied a

---

[24] All of these cases operated under the general rule that a hearing officer lacks jurisdiction to adjudicate a facial challenge, as opposed to an as applied challenge, to the constitutionality of an agency rule or statute.

rule or statute in an unconstitutional manner, the litigant must raise its equal protection claims pertaining to that application of the agency rule in the district court of appeal. 427 So. 2d at 156-57. Plaintiffs do not contest the holding of *Key Haven*, and concede that they had to bring any *state* equal protection claims on appeal to the district court. Plaintiffs assert, however, that because they made an *England-Jennings*[25] reservation in their amended Circuit Court complaint, their *federal* equal protection claims cannot be barred by *res judicata*.

An *England-Jennings* reservation allows a litigant to reserve his "constitutional claims for subsequent litigation in federal court by making on the state record a reservation as to the disposition of the entire case by the state courts' to preserve access to the federal forum." *Saboff v. St. John's River Water Mgmt. Dist.*, 200 F.3d 1356, 1359-60 (11th Cir. 2000) (citations omitted). In order to make an effective *England-Jennings* reservation and thereby avoid *res judicata*, a litigant must clearly set forth its intentions to preserve its federal claims, "on the record, and *at the outset* of the state court claim[.]" *Id.* at 1360 (emphasis added); *Fields*, 953 F.2d at 1309 n.10 (requiring litigant to make reservation "at the time he files his state law claims in state court."); *accord*

---

[25] This term derives from two seminal cases, *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964), and *Jennings v. Caddo Parish School Board*, 531 F.2d 1331 (5th Cir. 1976).

Koziara v. City of Casselberry, 239 F. Supp. 2d 1245, 1258 (M.D. Fla. 2002) ("from the outset").

Plaintiffs here admit that they did not make their *England-Jennings* reservation until after the district court of appeal issued its decision on the administrative proceeding. (Doc. 65 at 45). Plaintiffs argue that the Court nonetheless should not deem their *England-Jennings* reservation as untimely because they did not have the opportunity to make the reservation "before a trial court" until filing their amended complaint after the district court of appeal issued its decision. (*Id.*). The case law does not stretch as far as Plaintiffs wish. In *England,* Justice Brennan wrote:

> [a party] may inform the state courts that he is exposing his federal claims there only for the purpose of complying with *Government & Civic Employees Organizing Committee C.I.O. v. Windsor,* 353 U.S. 364 (1957), and that he intends, should the state courts hold against him on the question of state law, to return to the District Court for disposition of his federal contentions. Such an explicit reservation is not indispensable; the litigant is in no event to be denied his right to return to the District Court unless it clearly appears that he voluntarily did more than *Windsor* required and fully litigated his federal claims in the state courts.

375 U.S. at 421. Brennan's term "state courts" is not limited to a trial court, as evinced by the plural use of the word "courts." Case law since *England* confirms

this notion with regard to administrative proceedings. *See, e.g., Sharpley v. Davis,* 786 F.2d 1109, 1112 n.2 (11th Cir. 1986) (noting that, where a plaintiff wishes to preserve access to a federal forum, he must do so "at the earliest administrative level" or else "subsequent state court review of that initial administrative determination . . . eliminates the opportunity to present such federal claims in a federal forum."). From a policy standpoint, this rule makes sense; a plaintiff cannot wait to suffer an adverse ruling in state court before it alerts Defendants of its intentions and thus receive a second bite at the apple. *Koziara,* 239 F. Supp. 2d at 1258 ("a plaintiff cannot wait until it receives an unfavorable decision in state court and then adjudicate its claims in federal court."). For these reasons, the Court finds that Plaintiffs' *England-Jennings* reservation was not timely.

Thus, the Court further finds that Plaintiffs' equal protection claims are barred by *res judicata.* During the administrative proceedings, Plaintiffs freely and without reservation litigated their disparate treatment claim before the ALJ and did not appeal the fact findings to the district court of appeal. Where a party freely litigates an equal protection[26]

---

[26] Under the Florida Constitution, the equal protection and due process standards are the same as the federal standards. *Duncan v. Moore,* 754 So. 2d 708, 712 (Fla. 2000) (adjudicating state and federal equal protection and due process claims together); *accord Rice v. State,* 754 So. 2d 881, 884-85 (Fla. 5th DCA 2000).

claim, regardless of whether he seeks direct review of the decision, he effectively elects to forgo his right to bring those claims in federal court. *England,* 375 U.S. at 419, 84 S.Ct. 461.[27] Based on the foregoing analysis, Count V must be dismissed.

C. Counts VI and VII: Due Process

For the same reasons as stated in regard to the equal protection claims, Plaintiffs' federal due process claims, as they relate to the agency action, are barred by *res judicata.*

Plaintiffs' claims with regard to conduct that occurred subsequent to the administrative proceedings – namely conduct in relation to an alleged oral agreement between St. Johns and Plaintiffs – also must be dismissed. Although not barred by *res judicata* (because those allegations involve post-administrative hearing conduct), breach of an oral agreement or contract does not state a substantive due process claim. For these reasons, Counts VI and VII must be dismissed in their entirety.

---

[27] Defendants also moved to dismiss Plaintiffs' equal protection claims for failure to state a cause of action. The Court need not address this issue, given its finding of *res judicata.*

D. Count VIII: Declaratory Judgment; Express and Common Law Drainage Easements

Defendants St. Johns and FDOT move for summary judgment as to Count VIII, claiming that, as a matter of law, Plaintiffs do not have express or common law easements.

1. Express Easements

a. By Plat

Plaintiffs seek a declaration that they have express easement rights in the drainage system within the Titusville Subdivision Plat, which provides for road rights of way. Defendants contend that the word "road," as used in the Legend of the Plat, is unambiguous and does not expressly provide for drainage easements.

While it would not, at first blush, seem that the word "road" would create ambiguities, in the context of easements law, it does. *See* Jon W. Bruce & James W. Ely, Jr., *The Law of Easements and Licenses in Land* § 8.4 ("The scope of easements for a right of way granted in general terms has been the subject of much litigation. Courts have usually interpreted these conveyances as creating a broad right to use the easement for all reasonable purposes . . . the prevailing view is that utility poles and wires may be erected on a general right-of-way. Moreover, the installation of underground water, gas, or sewer pipes is usually deemed a reasonable use of a roadway easement."); *see also Fleming v. Napili Kai, Ltd.*, 430 P.2d 316, 319

(Haw. 1967) (finding it "the usual and common practice [in Hawaii] to use roadway easements as rights of way for electricity, telephone, water and drainage facilities," and concluding that the road right of way in that case was reserved not just for ingress and egress but also for those other purposes).[28] No case has adjudicated whether it is usual and common to use roadway easements as rights of way for drainage facilities in Florida,[29] but some state case law[30] suggests that a roadway easement may encompass uses beyond what might appear on its face. *See, e.g.*,

---

[28] The *Fleming* court so found because the decree at issue did not expressly state that the roadways were specifically and solely for ingress and egress, i.e., the "easement was without limitation or restriction." 430 P.2d at 318.

[29] Plaintiffs cite *Joynt v. Orange County*, 701 So. 2d 1249 (Fla. 5th DCA 1997), for the proposition that the term "road right of way" "necessarily includes the right to maintain drainage facilities such as drainage ditches, canals, and levies." (Doc. 57 at 32). What *Joynt* actually held was that the term "right of way" as used in the Florida Statute at issue could include a "road, canal, levee, or water control facility right-of-way right of way" because the legislature specifically provided for that broad definition. *Id.* at 1250 (emphasis omitted). "[H]ad the legislature intended to limit [the statute] to a 'road' right of way condemnation, it would have done so in plain language." *Id.* In the instant case, the Plat does not use the same specific language as the statute construed in *Joynt*.

[30] Modern statutory law also suggests that a roadway encompasses more uses than may be readily apparent. For example, Florida's Transportation Administration has defined "road" as including "associated sidewalks, the roadbed, the right-of-way, and all culverts, drains, sluices, ditches, water storage areas, waterways, embankments, slopes, retaining walls, bridges, tunnels, and viaducts necessary for the maintenance of travel and all ferries used in connection therewith." Fla. Stat. § 334.03(23).

Nerbonne, N.V. v. Fla. Power Co., 692 So. 2d 928, 929-930 (Fla. 5th DCA 1997) (holding that a general grant of a right of way for public road purposes includes the right to install public utilities, such as a power line).[31]

The Court finds that the Plat herein is ambiguous, and thus the Court may accept extrinsic evidence in relation to its meaning. *Wilson v. Dunlap*, 101 So. 2d 801, 805 (Fla. 1958); *see also Golden Hills Golf & Turf Club, Inc. v. Spitzer*, 475 So. 2d 254, 254-55 (Fla. 5th DCA 1985) (holding that the plat at issue was "obviously ambiguous" and therefore accepting extrinsic evidence to determine whether it showed that a bridle path was separate from or part of a dedicated road and thus not subject to an easement).[32] Accordingly, summary judgment is not proper.[33]

---

[31] In *Nerbonne*, the court noted that, generally, a power line, which does not interfere with highway travel, is a proper use of a highway easement and does not pose an additional burden on the underlying estate. 692 So. 2d at 929. Defendants contend that *Nerbonne* is inapposite because, unlike power lines, the drainage ditches at issue herein *would* interfere with road travel and would impose an additional burden on the underlying estate. Defendants ultimately may be correct but the Court cannot resolve these factual disputes at this stage.

[32] In *Golden Hills Golf*, after finding that the plat "was obviously ambiguous," the court looked to the affidavits submitted by appellees and determined that appellees had met their initial burden of demonstrating the plat's meaning. The burden thus shifted to appellant to provide counter evidence. Appellant failed to provide anything other than the plat itself, and thus, the court found in favor of appellees. 475 So. 2d at 255.

[33] Plaintiffs dedicate a section of at least one of their briefs to implied easements. Plaintiffs did not allege that they had

(Continued on following page)

b. By Warranty Deed

Plaintiffs argue that they have express easements reserved in several deeds as follows:

1) A warranty deed dated May 4, 1997, wherein developers of the Titusville Fruit and Farm Lands Company conveyed title: "subject to right of way, as shown by said plat for public roads, and excepting rights of way for necessary ditches." (Doc. 57 at Ex. L).

2) A warranty deed dated June 10, 1915, wherein lot owners within the Subdivision conveyed title: "subject to right of way as shown by plats for public roads and excepting rights of way for necessary drainage ditches." (Doc. 57, Ex. M).

3) A warranty deed dated April 3, 1957, wherein the landowners conveyed title of Subdivision lots subject to the following provision: "the parties mutually have the right to enter on any part of the adjoining lands from time to time for the purpose of keeping the drainage ditches open and to work the roads." (Doc. 57, Ex. N).

4) An agreement for sale dated January 3, 1956, which reads:

> The said lands are to be conveyed by warranty deeds and at the time of delivery of

---

implied easements, and hence the Court will not address Plaintiffs' arguments in relation thereto.

> deeds the First Party is to furnish abstract of title showing it or its associates to have good and merchantable title of record to the same, or that said titles will be insurable or satisfactory to the Federal Housing Administration for insurance of mortgages on portions thereof, except only for roads, canals and mineral reservations and reservations that have been had in Trustee deeds of the Improvement Fund of Florida.

(Doc. 57, Ex. O).

Defendants argue that, even if these deeds *refer* to easements, they do not *create* easements. The case law is clear, however, that an easement can be expressly created through reservations in a deed or other public document. *Walters v. McCall,* 450 So. 2d 1139, 1142 (Fla. 1st DCA 1984) (easement may be created by grant, which includes creation by reservation in a deed); *Hensel v. Aurilio,* 417 So. 2d 1035, 1037 (Fla. 4th DCA 1982) (easement may be created by an express grant or reservation; prescription; or implication).

Plaintiffs have presented sufficient evidence to create a material fact dispute as to whether the deeds at issue created easements by reservation. Where the wording of a deed is ambiguous such that the scope of an easement cannot be discerned from the deed's plain language, "the legal extent of the right must be ascertained from the intention of the parties, in light of the surrounding circumstances, at the time the easement right was created." *Walters,* 450 So. 2d at

1142 (emphasis omitted); *see also Star Island Assoc. v. City of St. Petersburg Beach,* 433 So. 2d 998, 1004 (Fla. 2d DCA 1983) (where a party relies upon the phrase "subject to" to create an easement by reservation, the words at best "create an ambiguity to be resolved by determining whether the intention of the parties, in light of surrounding circumstances and agreements, was to create an easement.") (citation omitted); *accord Corrigans v. Sebastian River Drainage Dist.,* 223 So. 2d 57, 58 (Fla. 4th DCA 1969) (*per curiam*)).[34] Summary judgment is therefore inappropriate.

2. Common Law Easements

Defendants assert that there is no common law right to accelerate flow of surface water through artificially created ditches and thus that Plaintiffs cannot as a matter of law possess common law drainage easements. *Seminole County v. Mertz,* 415 So. 2d 1286 (Fla. 5th DCA 1982), stated three general rules as follows: 1) an upper landowner may improve and increase natural drainage of his land so long as he acts reasonably and does not divert flow; 2) a lower landowner is subject to an easement for such flow as the upper landowner is allowed to cast upon him; and 3) a landowner may not gather surface waters that

---

[34] This is so because the words "subject to" generally are words of obligation, not contract. *Star Island Assoc.*, 433 So. 2d at 1004.

would naturally flow in one direction and divert them from their natural flow to cast them upon lands of the lower landowner to his detriment. *Id.* at 1289. A later Supreme Court case, *Westland Skating Center, Inc. v. Gus Machado Buick, Inc.*, 542 So. 2d 959 (Fla.1989), confirmed the second rule, i.e., that the lower landowner is subject to an easement, and added, "when any party improves his land, thereby causing surface waters to damage his neighbor's property, the reasonable use rule shall be applied. . . ." *Id.* at 963. The case law does not suggest as Defendants urge, i.e., that a landowner may not as a matter of law accelerate flow of surface water through ditches. Indeed, in *Robertia v. Pine Tree Water Control District*, 516 So. 2d 1012, 1013 (Fla. 4th DCA 1987), and *Corrigans*, 223 So. 2d at 58, the courts looked at the surrounding circumstances and the parties' intent at the time the easements were created to determine their scope. This Court must do the same. *See Walters*, 450 So. 2d at 1142; *Star Island Assoc.*, 433 So. 2d at 1004; *Corrigans*, 223 So. 2d at 58. Accordingly, Count VIII stands.

E. Counts IX and X: Trespass and Nuisance

As a matter of law, Plaintiffs cannot state a cause of action against St. Johns for recovery of damages due to floodwaters associated with St. Johns' approval of a permit for FDOT to block the drainage system.

Fla. Stat. § 373.443.[35] For this reason, Plaintiffs' trespass and nuisance claims must be dismissed to the extent they seek damages against FDOT and St. Johns.

F. Count IX: Permanent Injunctive Relief

Defendants contend that Plaintiffs' request for injunctive relief is an attempt to collaterally attack the results of a prior legal proceeding. For the reasons stated above, *res judicata* and collateral estoppel do not bar Plaintiffs' claims with regard to flooding.

---

[35] This statute provides:

> No action shall be brought against the state or district, or any agents or employees of the state or district, for the recovery of damages caused by the partial or total failure of any stormwater management system, dam, impoundment, reservoir, appurtenant work, or works upon the ground that the state or district is liable by virtue of any of the following:
>
> (1) Approval of the permit for construction or alteration.
>
> (2) The issuance or enforcement of any order relative to maintenance or operation.
>
> (3) Control or regulation of stormwater management systems, dams, impoundments, reservoirs, appurtenant work, or works regulated under this chapter.
>
> (4) Measures taken to protect against failure during emergency.

Fla. Stat. § 373.443.

Hence, Plaintiffs' request for injunctive relief will not, at this stage, be dismissed.[36]

G. Count XII: Equitable Estoppel

Defendants argue that Plaintiffs have failed to state a claim for equitable estoppel because they failed to allege a representation by a St. Johns agent upon which they relied. Plaintiffs did not respond to Defendants' arguments, so this portion of the Motion is granted as unopposed.[37]

H. Counts Against USFWS

USFWS moves to dismiss for two reasons. First, USFWS seeks a more definite statement as to which Counts are alleged against it. The Court agrees that the Third Amended Complaint is improperly unspecific as to whether Counts VI-XII are alleged against USFWS, St. Johns, FDOT, or all three Defendants. Plaintiffs, upon repleading, must make clear to whom each Count applies. Fed. R. Civ. P. 12(e) (court may grant motion for more definite statement where a pleading is "so vague or ambiguous that a party

---

[36] FDOT argued in one sentence in its memorandum of law that Plaintiffs have not satisfied the requirements for obtaining an injunction. (Doc. 52 at 3). Because the issue has not been fully briefed, the Court will not rule on it at this time.

[37] Defendants are correct, even if Plaintiffs had responded. (*See* Doc. 45 at ¶¶ 164-72: no allegation of specific misrepresentations by St. Johns' agent).

cannot be reasonably required to frame a responsive pleading").

Second, with regard to Count VIII, USFWS contends that Plaintiffs improperly seek to quiet title against the United States via the Florida declaratory judgment statute rather than the federal Quiet Title Act, 28 U.S.C. § 2409a. The Quiet Title Act waives sovereign immunity to suits that seek "to adjudicate a disputed title to real property in which the United States claims an interest. . . ." 28 U.S.C. § 2409a(a). This statute provides the only means by which to challenge federal ownership of real property. *See Block v. North Dakota,* 461 U.S. 273, 286 (1983) ("Congress intended the QTA to provide the exclusive means by which adverse claimants can challenge the United States' title to real property."). To the extent Count VIII seeks relief against USFWS, it is dismissed without prejudice for this reason.

IV. Conclusion

Based upon the foregoing analysis, it is therefore **ORDERED AND ADJUDGED** that:

1) USFWS' Motion to Dismiss (Doc. 46) is **GRANTED**. The Third Amended Complaint (Doc. 45) is dismissed in its entirety as against USFWS for failure to plead a definite statement of which Counts apply to USFWS. Moreover, Count VIII (declaratory relief) is dismissed as to USFWS for the reasons stated herein.

2) St. Johns' Motion to Dismiss (Doc. 47) is **GRANTED in part and DENIED in part**. It is **GRANTED** to the extent it seeks to dismiss Counts V (equal protection), VI-VII (due process), IX (trespass), X (nuisance), and XII (estoppel). It is **DENIED** to the extent it seeks to dismiss Counts I-IV (inverse condemnation), VIII (declaratory relief), and XI (injunctive relief).

3) FDOT's Motion to Dismiss (Doc. 51) is **GRANTED in part and DENIED in part** for the same reasons as described with respect to St. Johns' Motion.

4) Defendant St. Johns' and FDOT's Motions for Summary Judgment as to Count VIII (Docs. 47 and 51) are **DENIED**.

Plaintiffs shall have thirty (30) days in which to file a Fourth Amended Complaint in a manner consistent with this Order.

DONE and **ORDERED** in Chambers, Orlando, Florida this 13 day of April, 2004.

/s/ Greg Presnell
GREGORY A. PRESNELL
UNITED STATES
DISTRICT JUDGE

Copies furnished to:
Counsel of Record
Unrepresented Party

FILE COPY

Date Printed: 04/15/2004

Notice sent to:

____ Allan Paxton Whitehead, Esq.
Frese, Nash & Hansen, P.A.
930 S. Harbor City Blvd., Suite 505
Melbourne, FL 32901

6:03-cv-00718 lak

[/s/ LK 4/15] ____ David Smolker, Esq.
Bricklemyer, Smolker & Bolves, P.A.
500 E. Kennedy Blvd., Suite 200
Tampa, FL 33602-4990

6:03-cv-00718 lak

____ Matthew C. Lucas, Esq.
Bricklemyer, Smolker & Bolves, P.A.
500 E. Kennedy Blvd., Suite 200
Tampa, FL 33602-4990

6:03-cv-00718 lak

____ Ethan Jerome Leob, Esq.
Bricklemyer, Smolker & Bolves, P.A.
500 E. Kennedy Blvd., Suite 200
Tampa, FL 33602-4990

6:03-cv-00718 lak

____ Walter Kelly, Esq.
Fla. Dept. of Transportation
605 Suwannee St.
Room MS-58
Tallahassee, FL 32399-0458

6:03-cv-00718 lak

___ William H. Congdon, Esq.
St. Johns River Water
Management District
P.O. Box 1429
Palatka, FL 32178-1429

6:03-cv-00718 lak

___ Stanley J. Niego, Esq.
St. Johns River Water
Management District
P.O. Box 1429
Palatka, FL 32178-1429

6:03-cv-00718 lak

___ Samuel D. Armstrong, Esq.
U.S. Attorney's Office
Middle District of Florida
501 W. Church St., Suite 300
Orlando, FL 32805

6:03-cv-00718 lak

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 08-11799-EE

MODERN, INC., a Florida corporation,
FIRST OMNI SERVICE CORP.,
a Florid corporation,

Plaintiffs-Appellants,

versus

STATE OF FLORIDA,
UNITED STATES OF AMERICA,
DEPARTMENT OF TRANSPORTATION,

Defendants-Appellees.

ST. JOHNS RIVER WATER
MANAGEMENT DISTRICT,

Defendant-Third-Party-
Plaintiff-Appellee,

versus

BREVARD COUNTY, et al.,

Third-Party-Defendants.

On Appeal from the United States District Court
for the Middle District of Florida

BEFORE: HULL, WILSON and HILL, Circuit Judges.

ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING EN BANC

(Filed Apr. 17, 2009)

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ [Illegible]
UNITED STATES CIRCUIT
JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

Case no.: 6:03-cv-718-Orl-31DAB

MODERN, INC., and FIRST OMNI SERVICE CORP.,

Plaintiffs,

v.

STATE OF FLORIDA, DEPARTMENT OF TRANSPORTATION; ST. JOHNS RIVER WATER MANAGEMENT DISTRICT; and the UNITED STATES OF AMERICA,

Defendants.

Orlando, Florida
August 14, 2006
9:00 a.m.

Volume I

Transcript of a bench trial
before the Honorable Gregory A. Presnell
United States District Judge

Court Reporter: Diane C. Peede, RMR, CRR
United States Courthouse
80 North Hughey Avenue, #300
Orlando, Florida 32801
(321) 537-2130

Proceedings recorded by mechanical stenography, transcript produced by computer.

* * *

[55] THE COURT: Okay.

BY MR. SMOLKER:

Q. Mr. Moehle, you just testified that you first observed flooding of the property, I think it was in – what year?

A. The period of 1993 to 1996.

Q. And where did you first observe flooding and, if so, what did you observe, let's say, with respect to the grove area?

A. Well, there was water standing at the intersection, and then trying to find out where –

Q. When you say –

A. Well, it was observed for several – for quite a while it was accumulating in the intersection, and then it seemed to never go down. So –

THE COURT: When you say, "intersection," what do you mean?

THE WITNESS: Intersection of I-95 and 50, in the northwest quadrant.

A. So since it never went down, then after a period of time I headed up north to see on the property – to the grove to see what was going on; and arriving at the grove, there was water standing in the grove and the water didn't go down; and on the tops of the beds of the groves it was much as a foot to a [56] foot and a half deep, and that water didn't seem to go down.

Q. What about in the pond one area? Did you observe the conditions of the pond one area at that time?

A. Yes.

Q. Describe those conditions.

A. A large amount of water in it.

Q. How did it compare to the amount of water you previously observed in that area?

A. It was greatly enlarged.

Q. What about at the culvert of I-95 and the east-west point? At that time did you observe the water levels at I-95 and east-west-1?

A. Yes, and they were – they were quite high; and they were somewhere between one-half the height of the opening of the box culvert, which I think was three or four feet deep, and they were about a half to two-thirds up, and they should have been dry.

Q. And what about the intersection of – the culvert at the intersection of NS-1 and State Road 50? At that time did you observe water levels at that location?

A. Yes, and that was the same. That was – that was a large double box culvert, three feet deep, eight [57] feet wide. The water levels were also a half to two-thirds and, actually, a little higher, almost up to the top of the culvert.

Q. How did that compare to the conditions you previously observed?

A. Well, the previous observations were anywhere from dry to something less than a foot in it, depending on what was happening.

Q. Did you have occasion to at that time inspect the intersection of the culvert at NS-2 and State Road 50?

A. Yes.

Q. And what were the conditions that you observed at that time?

A. The conditions of that one were more exaggerated and the culverts were underwater, and they stayed underwater forever.

Q. Did you have occasion to observe a driveway across the Indian River City canal? If I may approach. I'm again referring to demonstrative Exhibit Number 1. Did you have an occasion to observe the conditions at a driveway crossing the Indian River City canal from State Road 50?

A. Yes.

Q. Point out to the Court roughly where that is on [58] demonstrative Exhibit 1.

A. The yellow line is over it, but it's in this area right in here, which is about –

Q. That would be just to the east –

A. – about a mile and a half east of Hacienda Road.

Q. Just near what is shown as number 26 in green?

A. Yeah. About the six, yeah.

Q. What were the conditions that you observed at that road crossing at that time?

THE COURT: That's a crossing of Hacienda Road and what?

THE WITNESS: No. It's a crossing of the Indian River City canal east of Hacienda Road, about a mile and a half.

THE COURT: At State Road 50?

THE WITNESS: At State Road 50.

THE COURT: All right.

BY MR. SMOLKER:

Q. If you would, just for the record, point out for the Court where the Indian River City canal runs.

A. Indian River City canal runs from here to here, and depending – it really goes out here, but it also has an intersection that takes it out to this roadside ditch, State Road 50 roadside ditch all the way to the [59] St. Johns River.

Q. Now, what were the conditions that you observed at the road crossing of the Indian River City canal?

A. There was a road crossing there that had no culvert under it, so it was a complete blockage of the canal.

Q. What were the water level conditions at that time at that location?

A. Well, they were significantly higher on the east side of the road than they were on the west side.

Q. At that time did you have occasion to observe the hydrologic conditions on Modern's property and First Omni's property east of I-95?

MR. CONGDON: Objection, Your Honor; compound question, and the problem being First Omni's property.

MR. SMOLKER: I'll rephrase, Your Honor.

THE COURT: Okay.

BY MR. SMOLKER:

Q. Mr. Moehle, at that time did you have occasion to observe the conditions that existed to the east of I-95 in the vicinity of Modern's property and on Modern's property?

A. Yes.

Q. And what did you observe with respect to the [60] east-west-1 canal?

A. Well, it was at a higher level.

Q. When you say, "higher," higher than previously observed?

A. Yes. I think I pretty much answered that with answering about the box culvert under I-95, which was the east-west canal; and also the culvert under 405, it also was much higher than the invert, which is the bottom of the culvert.

Q. And, generally, did you observe any ponding, either on Modern's property or on properties adjacent to Modern's property?

A. Yes. To the south, there was water standing; and on to the east, there were – I mean, to the south, there was water standing. To the north, there was not the same kind of water standing, which was significant on the south; but there was water or moisture towards the tops of some of the areas.

Q. Now, did you have occasion at that time –

THE COURT: Mr. Smolker, could you do me a favor and take this chart thing and angle it toward me and put that demonstrative up so I can follow along visually when we're talking about all this. That would help me.

MR. SMOLKER: Your Honor, if you wish, I

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

Case no.: 6:03-cv-718-Orl-31DAB

MODERN, INC., and FIRST OMNI SERVICE CORP.,

Plaintiffs,

v.

STATE OF FLORIDA, DEPARTMENT OF TRANSPORTATION; ST. JOHNS RIVER WATER MANAGEMENT DISTRICT; and the UNITED STATES OF AMERICA,

Defendants.

Orlando, Florida
August 15, 2006
9:00 a.m.

Volume II

Transcript of a bench trial
before the Honorable Gregory A. Presnell
United States District Judge

Court Reporter: Diane C. Peede, RMR, CRR
United States Courthouse
80 North Hughey Avenue, #300
Orlando, Florida 32801
(321) 537-2130

Proceedings recorded by mechanical stenography, transcript produced by computer.

* * *

[325] THE COURTROOM DEPUTY: A-28 is (pointing).

MR. SMOLKER: Okay.

THE COURT: Do you have any more questions of Mr. Moehle?

MR. SMOLKER: Briefly, Your Honor.

BY MR. SMOLKER:

Q. Mr. Moehle, have you observed the hydrologic conditions of the property, both Modern's and First Omni's, since 1996?

A. Yes.

Q. How would you characterize the change, if any, in the hydrologic conditions of the properties?

A. Since 1996, I don't think it's changed much. As I recall, 1996 would be after the Hacienda Road ditch filling and the – so the water has been high since then, and that would be post-State Road 50 widening. So the water has been high since that time.

Q. With reference to what's been marked as Exhibit Number 2, would you point out to the Court where you have observed high water on Modern and First Omni's properties since 1996.

A. Here at the head wall, in the east-west ditch and the head wall of State Road 405, within pond one and the entire surrounding area, up into the grove, at the head wall of the NS-1 ditch and along its entire [326] length. There's usually a significant head difference between the upstream of these culverts that were inserted by the county and downstream. The

high water conditions here translate all the way back east of 95 and in the area which is served by the east-west-1 ditch to the north around the borrow pit as well.

Q. Now when you say, "high water," are you referring to flooding?

A. Yes.

Q. All right. And since 1996 to the present, how would you characterize the frequency of that flooding?

A. Well, it stays flooded for the entire wet season. The water does not go down, and it takes several months after the rain has stopped for it to go down. It doesn't seem to have any way out. The only way the water gets out after it reaches a certain point is through evaporation.

Q. And as you move west along State Road 50, how would you characterize the conditions, hydrologic conditions there as you're moving west?

A. As you're moving west on State Road 50, the entire drainage system for State Road 50 up to the S-turn to the west is flooded during the entire wet season. So that's indicative of – and the water – the main way water gets out, the only avenue it seems [327] to have left is NS-2 in this small culvert. I believe it's a 36-inch culvert, but it's not a double concrete box like we see at NS-1. This flows full volume continuously, and in fact the top of it is submerged during the entire dry season.

The NS – the roadside ditch on the south side of State Road 50, which is supposed to convey water out to the river, actually from this location flows east.

Q. You say, "this location." For the record –

A. From approximately just east of the S-turn of State Road 50 flows east and, I guess, just sheet flows down here.

The water which comes through this NS-2 culvert hits this point here where the guard shack was constructed for The Great Outdoors, and – actually, a ditch has been reconstructed, not quite as big as the old one, along the road here; and there is a ditch that goes to the west, and water is going out through there; but at the same time it's also just overtopping the ditching all along this length and just flowing out over the land.

Q. So during the wet season, how would you characterize the condition of First Omni's and Modern's property from the standpoint of whether it is [328] impounded with water or not?

A. It's definitely impounded.

Q. And how long does that impoundment tend to last?

A. Shortly after the rainy season starts to several months after it ends.

Q. What about elevated ground water conditions? Have you observed elevated ground water

conditions on either Modern's or First Omni's properties or both?

A. Yes.

MR. CONGDON: Objection, Your Honor. The ground water is not subject to personal observation. So unless there's a foundation that he's actually done an analysis of water below the ground –

THE COURT: Sustained. We need to go ahead and take our lunch break. I have a one o'clock sentencing. So we'll reconvene at 1:30.

MR. SMOLKER: Thank you, Your Honor.

(A lunch recess was taken.)

MR. SMOLKER: Your Honor, we have no further questions of Mr. Moehle.

THE COURT: Okay. Cross?

CROSS-EXAMINATION

BY MR. CONGDON:

Q. Mr. Moehle, how many employees does First Omni

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

Case no.: 6:03-cv-718-Orl-31DAB

MODERN, INC., and FIRST OMNI SERVICE CORP.,

Plaintiffs,

v.

STATE OF FLORIDA, DEPARTMENT OF TRANSPORTATION; ST. JOHNS RIVER WATER MANAGEMENT DISTRICT; and the UNITED STATES OF AMERICA,

Defendants.

Orlando, Florida
August 15, 2006
9:00 a.m.

Volume II

Transcript of a bench trial
before the Honorable Gregory A. Presnell
United States District Judge

Court Reporter: Diane C. Peede, RMR, CRR
United States Courthouse
80 North Hughey Avenue, #300
Orlando, Florida 32801
(321) 537-2130

Proceedings recorded by mechanical stenography, transcript produced by computer.

* * *

[352] A. I did, yes.

Q. At that time what were your basic findings and conclusions with regard to the larger basin of that area?

A. Your Honor, what we – two things that hydrologically affect a piece of property, one is the water coming to it and the other is the capacity of the system to take water away from it. As water comes to it, water would begin to stack up on the property; and as water moves away, then the system works that way.

So I investigated the whole basin to determine what contributed towards Modern property and the First Omni property; and then, in addition to that, I looked at the canal system and the culvert system and the roadway system that was in place to allow water to flow away from it.

Q. Mr. Sprinkle, I'm going to show you an exhibit that's been marked for demonstrative identification purposes as Exhibit 2. Could you briefly describe to the Court what the scope of your investigation was and the places that you investigated at the time in 1997.

A. Well, this actually doesn't show it all. There was a larger basin.

Q. Do you have a map that shows that?

[353] A. I do, yes.

Q. Mr. Sprinkle, perhaps this would help.

A. That's it, yes. That's what I was looking for.

MR. SMOLKER: Your Honor, we are –

THE COURT: Take the pencil out of your mouth so we can understand what you're saying.

MR. SMOLKER: I'm sorry, Your Honor.

THE COURT: Thank you.

BY MR. SMOLKER:

Q. Mr. Sprinkle, please explain to the Court what this exhibit depicts?

A. This exhibit, Your Honor, we mapped what we refer to as drainage basins for the whole area. This is – just to orient you, this is Interstate 95 going north and south. This is State Road 50 running east and west.

The Modern property is just north of State Road 50, on the west side of Interstate 95; and the First Omni property is just east of Interstate 95, over here, north of the canal we refer to as east-west-1.

There was a large basin east of Interstate 95 that contributes water down and ultimately through culverts located at Interstate 95 and out into an area that's referred to as the prairie, which is now [354] primarily owned by the Fish and Wildlife Commission. And this comes under Interstate 95 and right out into this prairie area.

THE COURT: You're saying the water from the developed area up in Titusville actually drains south and then west?

THE WITNESS: That's right, and then goes west. All this basin that you see mapped out here ultimately flows directly under the interstate and into this area that is, for the most part, the Fish and Wildlife property.

A. Then, as this water comes down out into this way, it has two areas. There's a series of canals that are located in this basin that were cut back in the early 1900s, and these canals flow south and these canals flow west; and the canals flow south into what is called the Addison canal – at one time that was referred to as the Ellis canal – and into the St. Johns River.

These that flow west, flow west out here into the flood plain of the – the lower flood plain of the St. Johns River and ultimately discharge into the St. Johns River.

So this is the system that takes water away and this is the system that contributes water to [355] the Modern and First Omni property.

BY MR. SMOLKER:

Q. Mr. Sprinkle, in terms of the natural condition, the hydrologic conditions of that area, please describe in general terms to the Court what the natural overland flow pattern would have been prior to the excavation of the ditch system in this area. Do you need this exhibit?

A. Well, that would help, I think, yes.

The property over here is what I will refer to as the upper reaches of the St. Johns River flood plain, and the water flows to the south. It would just flow perpendicularly towards, in a sheet flow fashion, towards the St. Johns River. So the water would have flowed over on this side. It would have flowed more westerly down here, southwesterly here, it would have flowed more southerly, because the basin makes kind of a sweeping turn as it comes right through here.

Q. Now, specifically with regard to Modern and First Omni's properties, what would have been the natural overland flow characteristics of surface water flows to, across and from their properties?

A. Both of those would have flowed west and southwest. It would have flowed – as you see these

* * *

[396] over here.

THE COURT: It parallels 95 to the east.

A. It parallels 95 to the east, that's right.

Q. What, if any, effect on sheet flow does it have?

A. Well, there used to be a ditch, one of these north-south ditches, coincidental with 405 south under State Road 50 and continued all the way down to the Addison canal, and that has been blocked. That no longer exists, and that water now must flow under

the interstate here. It no longer can go south. It's going to come this way.

Q. Now –

MR. SMOLKER: Your Honor, we'd offer the exhibit into evidence.

THE COURT: Okay. Any objection?

(No response.)

THE COURT: It would be admitted.

BY MR. SMOLKER:

Q. Now, Mr. Sprinkle, by 1969 any other significant things that may have happened in the basin to the east of I-95 in terms of growth and development?

A. Well, yes. The City of Titusville was growing by leaps and bounds, and there was quite a bit of [397] residential development that was occurring in the area of Titusville.

Q. Now, in the area of, call it, West Titusville, east of I-95, how does that general area drain, at least to the extent that it's within the basins that you looked at?

A. Well, I think I pointed this out earlier; but in the 1970s model, everything that's bounded in yellow east of I-95, if it's north of 50, it comes down this way and flows west through the interstate. So this entire basin now must be accommodated by these canals.

Q. What, if any, effect does urban development have on storm water quantities?

A. Urban development typically increases the volume of storm water that needs to be contended with. If no attempt has been made to attenuate the peak runoff discharge, then it also increases the peak flow rates. Cubic feet per second is the way we measure the flow coming off of the property, and it – so volume and peak rate can be impacted by urban development.

Q. Explain to the Court what "peak rate" means.

A. We measure flow typically for this type of work in cubic feet per second, and that's how fast water is [393] coming down the hose; and the reason that's important is we know how big – for instance, if I have a culvert that's 24 inches in diameter, I know how many cubic feet per second can comfortably flow down that culvert. So if I know how many cubic feet per second are coming to me, I know if I need one, two, three or four culverts to accommodate that flow adequately.

So we measure – this is typically the way we measure flow. This is the way we determine whether our system functions correctly or whether it doesn't function correctly, usually is by rate of flow.

Rate of flow also, as it comes in, creates what we call stage or elevation in the water; and we are able to model – if the flow downstream is not as – does it

match the flow upstream? Then the water impounds here and begins to go up, and we're able to measure that. We're able to determine how high that water will go, and that's what we're all about.

Q. Mr. Sprinkle, are you familiar with the State Road 50 widening project?

A. I am, yes.

Q. Explain to the Court what the hydrologically significant features of that widening project were for drainage in this area of State Road 50. Do we need an exhibit of any kind?

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

Case no.: 6:03-cv-718-Orl-31DAB

MODERN, INC., and FIRST OMNI SERVICE CORP.,

Plaintiffs,

v.

STATE OF FLORIDA, DEPARTMENT OF TRANSPORTATION; ST. JOHNS RIVER WATER MANAGEMENT DISTRICT; and the UNITED STATES OF AMERICA,

Defendants.

Orlando, Florida
April 16, 2007
9:00 a.m.

Volume V

Transcript of a bench trial
before the Honorable Gregory A. Presnell
United States District Judge

Court Reporter: Diane C. Peede, RMR, CRR
United States Courthouse
80 North Hughey Avenue, #300
Orlando, Florida 32801
(321) 537-2130

Proceedings recorded by mechanical stenography, transcript produced by computer.

* * *

[716] evidence. I guess it's already in, but we would submit that we've laid the predicate and . . .

THE COURT: All right. Well, it's in the nature of a demonstrative, but it's a bench trial. It would be helpful to me.

If you have problems with it, I'll deal with whatever you say is not right about it on cross or through your own experts.

MR. CONGDON: Yes, sir.

THE COURT: All right. I'll admit it.

BY MR. SMOLKER:

Q. Mr. Sprinkle, one other question in relating to the ditch system and your research of the ditch system.

THE COURT: Are you done with this?

MR. SMOLKER: Yes, I am, Your Honor.

THE COURT: All right.

BY MR. SMOLKER:

Q. Based on the investigation that you conducted of the newspaper articles and your review of the aerial photographs, was there any other evidence that you reviewed that would tend to suggest what the original design specifications of this ditch system were and, in particular, we're focusing in in the area in and around Modern and First Omni's property?

A. Yes.

MR. CONGDON: Objection, Your Honor; calls for [117] speculation.

THE COURT: Overruled.

A. There were several things that I looked at. Of course, I looked at the aerial photographs and looked at the size of the ditches that were ultimately – ultimately constructed as part of this system.

In addition to that, I personally was on the property and measured some of the ditch systems that were, in my opinion, unaltered. They were – they had not been part of some alteration process or they weren't impacted.

In addition to that, there were surveys that were conducted along north-south-1. Some of those surveys were conducted before Modern improved or maintained north-south-1, but those surveys extended beyond that maintenance activity. They extended into areas that had not been impacted by any construction that had been done. So those surveys were useful to me to determine what this ditch system was like. So I've used a variety of things to look at.

There are also some surveys that were conducted – special-purpose surveys conducted on the refuge by the Fish and Wildlife Service. The purpose of those mostly was to survey blockages that had been placed in the ditches. However, some of those survey cross-sections were in areas that had not been altered.

[718] So I was able to use those surveys to look and see, you know, what the width of the ditch system

was, what the depth of the ditch system was and, in my opinion, what the original design specifications of that ditch system were.

Q. What were they?

A. In my opinion, it was five feet deep and 20 feet wide, would be an average ditch system through here, except for the Ellis canal, which was much larger.

Q. And do you have any evidence that – strike that. And would that opinion apply to the N-S-1, east-west-1 ditch system that serves Modern and First Omni's property?

A. Yes, it would.

Q. Mr. Sprinkle, already into evidence is a report called the Black, Crow and Eidsness report. Are you familiar with that report?

A. Yes, I am.

Q. In the conduct of your studies and analysis, is that report significant to you in any way?

A. Yes.

Q. Why is it significant?

A. One thing, the Black, Crow and Eidsness report was done in 1986; and it predates any activity or actions that were accomplished by any of the parties in this room.

The Black, Crow and Eidsness report shows that there's a substantial portion of property east of Interstate [719] 95 that flows west through culverts under Interstate 95 and into the ditch system as we find it. It also recognizes that there is a necessity to deal with that water that comes across; and the Black, Crow and Eidsness report ultimately proposes to replace this system with a large single-ditch system that would be, in my opinion, much easier to maintain but then it would carry a huge volume of water – continue to carry water west away from Interstate 95.

MR. SMOLKER: For the record, Your Honor, the Black, Crow and Eidsness report is also in evidence as A-7.

BY MR. SMOLKER:

Q. Mr. Sprinkle, you're familiar with the State Road 50 widening project; is that correct?

A. Yes, I am.

Q. Describe the features of the State Road 50 widening project.

A. Well, it was to increase it from a two-lane highway to a four-lane divided highway. They were going to build two lanes on the south side of the road. They were going to – as part of that, they would be impacting, as I recall, I think, 43 acres of wetlands. They would be impacting some flood plain. They would be constructing a mitigation solution on the Fish and Wildlife Service property. They would be putting storm water treatment system in the median.

They would be lengthening culverts currently under State Road

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

Case no.: 6:03-cv-718-Orl-31DAB

MODERN, INC., and FIRST OMNI SERVICE CORP.,

Plaintiffs,

v.

STATE OF FLORIDA, DEPARTMENT OF TRANSPORTATION; ST. JOHNS RIVER WATER MANAGEMENT DISTRICT; and the UNITED STATES OF AMERICA,

Defendants.

Orlando, Florida
April 17, 2007
9:30 a.m.

Volume VI

Transcript of a bench trial
before the Honorable Gregory A. Presnell
United States District Judge

Court Reporter: Diane C. Peede, RMR, CRR
United States Courthouse
80 North Hughey Avenue, #300
Orlando, Florida 32801
(321) 537-2130

Proceedings recorded by mechanical stenography, transcript produced by computer.

* * *

[1010] the size of it. Once you get past this little section here, it opens back up and north-south-1

north of here is still okay. A lot of activity has occurred right in this area at the intersection of north-south-1 and east-west-1.

Q. And could you see any ditch in the northern – say, 500 feet of north-south-1 south of the intersection?

A. There looks like there's some remains of a ditch here, but it looks to me like – I don't want to speculate on this photograph.

Q. You don't see any water standing?

A. I don't see any water standing in that ditch.

Q. Next I would like you to look at Defendants' Exhibit 601, a 1986 color infrared, and please describe what you see in the area of the intersection.

A. This is an interesting phenomenon. All of a sudden there are two ditch systems coming from Pond One to east-west-1; that the activity right here that's occurred in east-west-1 right at north-south-1, the ditch is almost occluded. West of it, the ditch continues.

North-south-1 northward is still an open ditch. The water is low in here.

South of it, it looks to me like the ditch's activity has occurred. The berm is beginning to disappear, and I believe it's winding up in the ditch; but I don't want to speculate further than that.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

Case no.: 6:03-cv-718-Orl-31DAB

MODERN, INC., and FIRST OMNI SERVICE CORP.,

Plaintiffs,

v.

STATE OF FLORIDA, DEPARTMENT OF TRANSPORTATION; ST. JOHNS RIVER WATER MANAGEMENT DISTRICT; and the UNITED STATES OF AMERICA,

Defendants.

Orlando, Florida
April 18, 2007
9:00 a.m.

Volume VII

Transcript of a bench trial
before the Honorable Gregory A. Presnell
United States District Judge

Court Reporter: Diane C. Peede, RMR, CRR
United States Courthouse
80 North Hughey Avenue, #300
Orlando, Florida 32801
(321) 537-2130

Proceedings recorded by mechanical stenography, transcript produced by computer.

* * *

[1204] of the information prepared by Breedlove Dennis, the information by Mr. Sprinkle, and of

course the appraiser, information held in our meetings and discussions with the landowners.

Q. Have you had occasion to review Mr. Sprinkle's report in this case?

A. Yes.

Q. And in addition to that, those items, have you conducted any further investigation of the property in terms of zoning and comprehensive planning-type issues?

A. Yes. I have evaluated both Brevard County as well as the City of Titusville's comprehensive plans, land use maps, regulations and zone maps, as well as had discussions with their staffs.

Q. And if you were to generally describe the types of uses that this property would be suited for, give us just general qualitative characterization, if you would.

THE COURT: Are you talking about both sides of the highway?

MR. SMOLKER: Yes.

A. The proximity to the interstate and the properties that are on the west side of the interstate, in particular with immediate visibility and access from the interchange, gives it tremendous high intensity commercial and mixed use opportunities.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

Case no.: 6:03-cv-718-Orl-31DAB

MODERN, INC., and FIRST OMNI SERVICE CORP.,

Plaintiffs,

v.

STATE OF FLORIDA, DEPARTMENT OF TRANSPORTATION; ST. JOHNS RIVER WATER MANAGEMENT DISTRICT; and the UNITED STATES OF AMERICA,

Defendants.

Orlando, Florida
April 30, 2007
9:00 a.m.

Volume XII

Transcript of a bench trial
before the Honorable Gregory A. Presnell
United States District Judge

Court Reporter: Diane C. Peede, RMR, CRR
United States Courthouse
80 North Hughey Avenue, #300
Orlando, Florida 32801
(321) 537-2130

Proceedings recorded by mechanical stenography, transcript produced by computer.

* * *

[1957] BY MR. SMOLKER:

Q. Now, Mr. Brown, I think you conducted several field investigations in the 1996-1997 time frame at the refuge?

A. Yes.

Q. And in connection therewith, you identified blockages and high points within the system that you thought were relevant to consideration of the drainage issues in this case; is that correct?

A. Yes.

Q. If you would, sir, I would like to start with the east-west-1 blockage west of the N-S-1 intersection. Can you mark on that exhibit the general location of that particular blockage?

A. (Witness complies with request.)

Q. If you at all need to refer back to Exhibit 5 of your deposition, that's fine.

You also indicated a blockage in N-S-1 south of east-west-1. Could you mark that blockage?

A. (Witness complies with request.)

Q. Now, you also marked two blockages, one each in the east-west-1.5 and east-west-1 ditches, by what we call the center road. Can you mark those blockages? And if need to refer to Exhibit 5, it's on the screen.

A. (Witness complies with request.)

Q. You also indicated on Exhibit 5 the blockages that were [1958] created as a result of the Hacienda Road mitigation. Could you go ahead and mark those?

A. (Witness complies with request.)

Q. Now, on the west side of Hacienda Road, if you were to compare the premitigation project with the post-mitigation project, isn't it true that the ditch on the west side of Hacienda Road immediately adjacent to the road was filled as part of the mitigation project?

THE COURT: Which ditch? There are several ditches.

MR. SMOLKER: This would be a north-south ditch running immediately adjacent to Hacienda Road on the west side.

THE COURT: Okay. You didn't say north-south.

A. Well, I have looked at that a little closer. I don't see where the ditch – let me break it up into segments. We look at the southernmost section of that ditch, which I'll say is from culvert number one, near the IRCC canal, back to State Road 50, I don't see where that ditch is filled at all. It looks like it's similar to what was on the original survey.

When you go from culvert one up to the east-west-1.5 ditch, you've got a very shallow swale ditch on the west side of Hacienda Road. If you look at the

original survey, you also had a very shallow ditch, maybe a somewhat [1959] shallower than what it was back when the survey was done, but you still have basically a shallow ditch at that location.

Then from east-west-1.5 north to east-west-2, you have no ditch today, and the survey doesn't show a ditch back when it was done.

Q. All right. And is there any –

THE COURT: Which survey are you referring to?

THE WITNESS: The one that was done prior to the mitigation project.

BY MR. SMOLKER:

Q. Is there any evidence of that swale that exists out there today having been filled in with debris?

A. Well, we saw it the other day. There was some cabbage palms knocked over in the ditch. There's a lot of cattails and vegetation in the ditch. Other than that, I can't see where fill was in the ditch.

Q. Now, on the east side of Hacienda Road, just north of the intersection of Hacienda Road with the Indian River City canal, there is a blockage that has been inserted in the north-south canal immediately adjacent to the east side of Hacienda Road, correct?

A. Correct.

Q. If you could, mark that particular blockage, please.

A. (Witness complies with request.)

Q. Now, you also indicated that there was what you believed [1960] to be a ridge of slightly higher elevation roughly midway out on the refuge, correct?

A. Yes.

Q. If you would be so kind as to mark that ridge in black.

MR. SMOLKER: May I approach the witness, Your Honor?

THE COURT: Yes.

MR. CONGDON: Your Honor, I would object. If we're trying to use this for the precise location of these things, we have surveys in there. If it's just a general idea of where the ridge is, I think that would be fine; but if we put this in evidence, it may be misleading if he's not exactly right.

THE COURT: Well, it's a demonstrative, as I understand it, for the purposes of discussion, I understand the survey would be more accurate.

A. (Witness marking.)

Q. And you also indicated on Exhibit 5 to your deposition a blockage in the N-S-1 ditch south of State Road 50. Would you mark that in green.

THE COURT: The problem is he marked that on the other side of the section line than he marked it on his deposition, I think.

MR. SMOLKER: He marked it in a different location?

THE COURT: Uh-huh.

[1961] BY MR. SMOLKER:

Q. Mr. Brown, if you would, compare Exhibit 5 –

THE COURT: We can't see it.

A. Well, the ridge is a little bit east of – well, you know, the ridge is a little bit wide.

Q. Okay.

THE COURT: So mark a parallel line.

A. North-south-4 right here sort of cuts through the ridge. So I could draw the ridge line on the east side or the west side, but that's about where it is near north-south-4.

Q. All right. Draw a comparable line –

THE COURT: Draw parallel lines then where the ridge slope is.

A. (Witness complies with request.)

THE COURT: There we go.

BY MR. SMOLKER:

Q. Thank you. Did you mark the blockage in the N-S-1 south of State Road 50?

A. Well, by blockage, this is a restriction, and that would be the culverts at the driveway.

Q. If you could, go ahead and mark that in green.

A. (Witness complies with request.)

Q. Now, you also indicated, I believe, another pair of restrictions in, I believe it would be, the N-S – it would be the N-S-4 ditch right at State Road 50. If you want to [1962] refer to Exhibit 5 from your deposition, it shows the two restrictions.

A. Yes.

Q. Describe those restrictions.

A. Well, the one north of State Road 50 where the N-S-4 comes into the IRCC, we saw that out in the field. It was about – the ditch was about a half a foot deep at that location.

On the other side of 50, it appears to be some restrictions between the State Road 50 ditch and where the north-south-4 begins and runs south.

Q. Now, you're familiar, are you not, with what's been referred to as the Port St. Joe mitigation project?

A. Well, there's a Port St. John.

Q. I'm sorry. Port St. John mitigation, are you familiar with that?

MR. CONGDON: Objection, Your Honor; relevance.

THE COURT: I don't know yet.

BY MR. SMOLKER:

Q. Are you familiar with that mitigation project?

THE COURT: Hold the thought.

A. Yes.

Q. You don't have to mark this, but I could refer you to Exhibit 5 to your deposition, there's a blue area that's marked in the north-south-3 ditch, I believe it would be. Is [1963] that correct?

A. Yes.

Q. And then in the east-west-1 ditch to the west there's another blue mark, correct?

A. Yes.

Q. And the westerly blue mark, that was going to be a flashboard riser, correct, according to the permit?

MR. CONGDON: Again, objection; relevance.

MR. SMOLKER: Your Honor, it's relevant because – and I don't think there's any dispute the

Water Management District permitted Port St. John mitigation project which was for mitigation for the D.O.T. road widening project. It entailed the filling in of the blue area and it also entailed establishing flashboard risers in the east-west-1 ditch. It was approved and permitted by the District.

THE COURT: So?

MR. SMOLKER: It was later – at the request of the Water Management District, they asked D.O.T. not to construct it because they were concerned about upstream flooding. So it establishes – in my opinion, it establishes the fact that the Water Management District believes that plugging up of this system will cause upstream flooding problems.

THE COURT: All right. I'll allow it. We'll see what's material about it.

MR. CONGDON: Your Honor, if I may, I think you [1964] previously ruled that it was not admissible; but that aside, his representations as to what the Water Management District did which he then uses to claim relevancy are not in the record and –

THE COURT: But he's going to get it in the record, I presume.

MR. SMOLKER: That's correct, Your Honor.

MR. CONGDON: I'm sorry.

BY MR. SMOLKER:

Q. Mr. Brown, you're familiar with the Port St. John permit, correct?

A. Yes, sir.

Q. You were involved in the review of that permit, correct?

A. Yes.

Q. And have I accurately described what the proposed permit would have authorized had the D.O.T. gone forward with it?

A. It would authorize – it was a mitigation project associated with an interchange on I-95 and Port St. John; and the mitigation was at this location and it included, to the best of my recollection, some fill in north-south-3 and a structure that you're referring to. I don't recall exactly where that location was. You have it right there shown on the map and I assume that is the right location; but without seeing the plan, I don't remember if it is or not.

[1965] THE COURT: I can't see what you're referring to.

THE WITNESS: I believe he's referring to this location here.

THE COURT: Okay.

BY MR. SMOLKER:

Q. That was proposed to be flashboard risers?

A. Yes.

Q. And to what elevation would those riser boards have been able to have been extended to the maximum extent?

A. I believe it was to the top of the ditch.

Q. And the north-south area highlighted in blue is proposed to be filled in, correct?

A. Yes.

Q. And the Water Management District issued that permit, correct?

A. The Water Management District issued the permit, and then later we requested the D.O.T. come in with a modification to the permit.

Q. And the modification involved eliminating this particular mitigation proposal from the permit, correct?

A. Yes.

Q. And the reason that Water Management District asked D.O.T. to eliminate this mitigation project the permit was because they were concerned about potential upstream flooding impacts, correct?

[1966] A. Yes. At the time that we issued the permit, we did not realize that the ditch system extended off the U.S. Fish and Wildlife property; and when we did realize that, we requested they modify the permit.

Q. Now, are there any other blockages in the system west of I-95 that you have discovered since your deposition or that you're aware of that you have not marked on the exhibit?

A. Are there blockages on that? I have not marked them on here. I don't know if that matters; but, I mean, there are several blockages at I-95 that are not marked on this exhibit that are marked on that exhibit.

Q. If you could, go ahead and mark those and explain to the Court what the nature of those restrictions or blockages are.

A. We start with east-west-1 at I-95. We see blockage on the east side of I-95 where the ditch comes into the right-of-way, and we see blockages on the west side of I-95 where the culverts then flow out into Pond One. So I think you've got blockages at two locations there.

And then east-west-1.5, you have a blockage on U.S. Fish and Wildlife property immediately west of I-95; and I think when you look at the culverts out in the field, you basically see vegetation that's totally grown in over the whole ditch on both sides of I-95. So I think we've got blockages on both sides of that location.

Then at east-west-2.0, you have a blockage [1967] downstream of the culverts and then you have a blockage in that the culverts are much higher than any of the other locations. So the culverts would

actually be controlling discharge under I-95 at that location.

Q. When you say the culverts are too high, you mean the bottom of the culvert is higher than the bottom of the surrounding ditch?

A. No, I don't mean – I'm not saying that the culverts are too high. I'm just saying in relation to Hacienda Road and everything of concern in this case, the culverts are much higher than the marsh out at Hacienda Road or the blockages downstream at that location. So the culverts, by their elevation, are the control for the system.

Q. And these are the culverts underneath I-95?

A. Yes.

Q. Any other blockages that you become aware of in the system which you think are affecting the efficiency of the drainage system west of I-95?

A. I think the survey we looked at that showed the IRCC in north-south-2 show blockages coming from north-south-2 into the IRCC and show that the IRCC is very shallow at that location.

Q. Is that blockage marked on the exhibit?

A. No, it's not.

Q. If you would, please go ahead and do so.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

Case no.: 6:03-cv-718-Orl-31DAB

MODERN, INC., and FIRST OMNI SERVICE CORP.,

Plaintiffs,

v.

STATE OF FLORIDA, DEPARTMENT OF TRANSPORTATION; ST. JOHNS RIVER WATER MANAGEMENT DISTRICT; and the UNITED STATES OF AMERICA,

Defendants.

Orlando, Florida
April 30, 2007
9:00 a.m.

Volume XII

Transcript of a bench trial
before the Honorable Gregory A. Presnell
United States District Judge

Court Reporter: Diane C. Peede, RMR, CRR
United States Courthouse
80 North Hughey Avenue, #300
Orlando, Florida 32801
(321) 537-2130

Proceedings recorded by mechanical stenography, transcript produced by computer.

* * *

[1985] Plaintiffs' 310.

THE COURT: Okay. It's admitted.

THE WITNESS: Do you want me to answer the question?

THE COURT: Let's go ahead and get it marked first. Do you have a copy of it?

MR. SMOLKER: Yes, I do.

BY MR. SMOLKER:

Q. Can you see it on the screen, sir?

A. When you blew it up, I could see portions of it, yes.

Q. Okay.

MR. SMOLKER: Your Honor, I only have one copy of it. I'll just put it on the screen.

BY MR. SMOLKER:

Q. Are you able to read it, sir?

A. I believe I can.

Q. At the bottom, there is a paragraph called Ditch Measurements After Excavation, which I'll blow up here. Do you see that?

A. Yes.

Q. The ditch excavation that you're referring to in this paragraph was the excavation of N-S-1 by Modern, correct?

A. Correct.

Q. And those measurements were made shortly after the excavation, within, say, three months?

[1986] A. Yes.

Q. And would you agree with me that at that time the newly excavated ditch was approximately 16 to 17 feet wide?

A. That's what I measured it in the field on that date that's referred to in the memo, the e-mail.

Q. And that the northern section had been deepened by three to four feet, correct?

A. Yes.

Q. And do you know – would that mean that the ditch bottom elevation at the northern section of the N-S-1 ditch after excavation was approximately four feet?

A. Well, the northern end, it was 12.7 before the excavation. So it's three feet – if it's been excavated three feet, then it would be 9.7 after the excavation, according to my measurement.

Q. All right. So effectively the excavation of the N-S-1 ditch would have been approximately 16 to 17 feet wide and approximately three feet deep in the northern section?

A. Yes.

Q. And it would have been less depth in the southern section because that section was not occluded, correct?

A. Yes. The southern section was deeper to begin with, so there would have been less excavation.

Q. All right.

MR. SMOLKER: Your Honor, the Exhibit 26 to his

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

Case no.: 6:03-cv-718-Orl-31DAB

MODERN, INC., and FIRST OMNI SERVICE CORP.,

Plaintiffs,

v.

STATE OF FLORIDA, DEPARTMENT OF TRANSPORTATION; ST. JOHNS RIVER WATER MANAGEMENT DISTRICT; and the UNITED STATES OF AMERICA,

Defendants.

Orlando, Florida
April 30, 2007
9:00 a.m.

Volume XII

Transcript of a bench trial
before the Honorable Gregory A. Presnell
United States District Judge

Court Reporter: Diane C. Peede, RMR, CRR
United States Courthouse
80 North Hughey Avenue, #300
Orlando, Florida 32801
(321) 537-2130

Proceedings recorded by mechanical stenography, transcript produced by computer.

* * *

[2001] architecture or planning?

A. I've always worked as a planner.

Q. And explain the task you perform as a planner.

A. I'm typically hired to look at pieces of property, often to do what you call due diligence on a piece of property. We work on obviously the zoning, the land use, deal with the comprehensive plans and all of the land development regulations that deal with development in the state and . . .

Q. How long have you practiced as a land planner in the state of Florida?

A. All the 35 years that I've been practicing.

Q. Have you worked in any other states or countries?

A. Yes, sir. I've worked in Germany, in Saudi Arabia, in the Arab Emirates, Trinidad, Taiwan.

Q. Are you a member of the Institute of Transportation Engineers?

A. Yes, sir, I am.

Q. And how long have you been a member of that?

A. I'm going to have to look that up. Ten years.

Q. Okay. Have you been involved in any eminent domain cases?

A. Yes, sir, extensively over the last 16 years.

Q. How many times have you testified in court as an expert witness in planning?

A. About 17 times.

[2002] Q. Have you ever been qualified as an expert witness in the court as a land planner?

A. Yes, sir.

MR. KELLY: Your Honor, at this time I would tender Mr. Hawkins as an expert in land planning.

MR. LOEB: No objection, Your Honor.

THE COURT: All right, He will be so recognized.

BY MR. KELLY:

Q. Mr. Hawkins, were you retained by the Department of Transportation to assist in evaluation of planning issues of the subject property?

A. Yes, sir.

Q. Have you studied the comp plans of Brevard County and the City of Titusville?

A. Yes, sir.

Q. Can you tell us the future land use plan designations?

A. Yes, sir. We have two exhibits, one that shows the future land use designation of the city, which is map number two; and map number three – I've got it backwards. Map number three shows the city and map number two shows the county.

The northwest quadrant that we've been calling track number one has 60.9 acres; and of that, 22.3 is in the city and has a future land use of high intensity commercial. 38.6 is in the county; and of that, 27.8 has a future land [2003] use of community commercial and ten acres of the county portion is in agriculture.

Track number two, which is north of the Lowe's, is a 46.8 tract; and of that, 18.6 acres, which is the eastern portion of that, has a future land use of high intensity commercial; and just next to that is an 8.9-acre borrow pit, which has a future land use of residential; and then the western portion is in the county and it's a 19.3-acre tract and it's planned industrial park.

MR. KELLY: Your Honor, this has been identified as Defendants' Exhibit – the first exhibit, jurisdiction has been identified as Defendant Exhibit 434.

MR. LOEB: Your Honor, if I can ask the witness a couple of questions regarding this map?

THE COURT: Okay.

VOIR DIRE EXAMINATION

BY MR. LOEB:

Q. Mr. Hawkins, in preparing 434, is the only work that you did to review the Brevard County future land use map?

A. Yes, sir.

Q. And you transposed that information onto Defendants' Exhibit 434?

A. Yes, sir.

Q. And have you made any changes to this map as a result of your review of the Brevard County?

* * *

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ST. JOHNS RIVER WATER MANAGEMENT DISTRICT, Petitioner, vs. MODERN, INC.; FIRST OMNI SERVICE CORP.; HASLEY HART; and B. B. NELSON, Respondents, vs. DEPARTMENT OF TRANSPORTATION, Intervenor.	Case Nos.	97-4389 97-4390 97-4391 97-4392 97-4393
MODERN, INC., Petitioner, vs. ST. JOHNS RIVER WATER MANAGEMENT DISTRICT, Respondent.	Case Nos.	98-0426RX 98-0427RU
FIRST OMNI SERVICE CORPORATION, Petitioner, vs. ST. JOHNS RIVER WATER MANAGEMENT DISTRICT, Respondent.	Case Nos.	98-1180RX 98-1181RU 98-1182RX

* * *

RECOMMENDED ORDER IN CASE NUMBERS 97-4389, 97-4390, 97-4391, 97-4392, and 97-4393

An administrative hearing was conducted on June 1-5 and 8-12, and on October 28-29, 1998, in Viera, Florida, by Daniel Manry, Administrative Law Judge ("ALJ"), Division of Administrative Hearings.

APPEARANCES

For Petitioner: William H. Congdon, Esquire
Mary Jane Angelo, Esquire
Stanley J. Niego, Esquire
St. Johns River Water
Management District
Post Office Box 1429
Palatka, Florida 32178-1429

For Respondents: Allan P. Whitehead, Esquire
Moseley, Wallis and
Whitehead, P.A.
1221 East New Haven Avenue
Post Office Box 1210
Melbourne, Florida 32902-1210

For Intervenor: Marianne A. Trussell, Esquire
Murray M. Wadsworth, Jr.,
Esquire
Department of Transportation
605 Suwannee Street
Mail Station 58
Tallahassee, Florida
32399-0458

STATEMENT OF THE ISSUES

The St. Johns River Water Management District (the "District") alleges in Case Number 97-4389 that Respondent Modern, Inc. ("Modern"), excavated two ditches in wetlands without a permit, that the excavation was not exempt from a permit, and that Modern committed related acts alleged in the Administrative Complaint. The District proposes alternative plans for corrective action.

Modern and its co-respondents ("Respondents") contend that the excavation was not required to have a permit because either it was not an activity covered by the permitting statutes or it was exempt. In addition, Respondents charge that the proposed agency action is based on an unadopted rule that does not satisfy the requirements of Section 120.57(1)(e), Florida Statutes (1997). (All chapter and section references are to Florida Statutes (1997) unless otherwise stated.)

In Case Numbers 97-4390, 97-4391, 97-4392, and 97-4393, Respondents challenge an Emergency Order issued by the District to stop the drainage of wetlands. Respondents contend that the Emergency Order is facially insufficient, that there was no emergency, and that the corrective action has worsened conditions.

The issue in each of the rule challenge cases is whether an existing rule or an agency statement is an invalid exercise of delegated legislative authority within the meaning of Sections 120.52(8) and

120.56(1). Case Numbers 98-0426RX and 98-1180RX challenge Rule 40C-4.041 pursuant to Section 120.56(3). Case Number 98-1182RX challenges Rule 40C-4.051 pursuant to Section 120.56(3). Case Numbers 98-0427RU and 98-1181RU challenge an agency statement pursuant to Section 120.56(1) and (4). (Unless otherwise stated, all references to rules are to rules published in the Florida Administrative Code as of the date of this Recommended Order.)

* * *

or the larger system on either December 7, 1983, or March 2, 1974. Even if the evidence did establish the original criteria and if the excavation merely restored NS1 and EW1 to the original criteria, the evidence clearly shows that neither NS1, EW1, nor the larger system were constructed and operating in accordance with the original criteria on the prescribed dates. Rather, the evidence shows that NS1, EW1, and the larger system had become seriously degraded and no longer operated at their post-excavation levels.

10.2 Two Maintenance Dredging Exemptions

243. Modern claims that it qualifies for the exemption in Rule 40C-4.051(11)(b). That rule, in relevant part, exempts from the permitting requirements in Sections 373.413 and 373.416:

> The . . . maintenance dredging of existing manmade canals [and] channels . . . where the spoil material is . . . removed and deposited on a self-contained, upland spoil

> site which will prevent the escape of the spoil material and return water from the spoil site into wetlands or other surface waters, provided no more dredging is performed than is necessary to restore the canal [and] channels . . . to original design specifications and provided that control devices are used at the dredge site to prevent . . . deleterious substances from discharging into adjacent waters during maintenance dredging. . . . This exemption shall not apply to the removal of a natural . . . barrier separating a canal . . . or system from adjacent wetlands or other surface waters.

244. Prior to the amendment of Section 403.813(2)(f) in October 1997, the maintenance exemption in the statute was substantially similar to that in the quoted rule. The two

* * *

or irrigation ditch irrespective of the degree to which the bottom of each is "normally" covered by water: upstream or downstream of high spots or control elevations; during low-flow conditions and dry conditions in normal or wet years; and during dry years.

10.2(a)(2) Additional Requirements

254. Even if NS1 and EW1 were canals or channels, their excavation in 1997 does not qualify for the exemption in Rule 40C-4.051(11)(b). The excavation fails to satisfy several additional requirements for the exemption.

255. The spoil material from the excavation was not placed on an upland spoil site which prevented the escape of spoil material and return water into wetlands and surface waters within the meaning of Section 373.019(16). Rather, Modern placed the spoil material in wetlands. Modern placed approximately 1.5 acres of fill in wetlands in the form of spoil material from the excavation. Modern placed approximately .75 acres of such fill in the wetlands and surface waters north of Marsh-1.

10.2(a)(3) Original Design Specifications

256. More dredging was done than was necessary to restore NS1 and EW1 to their original design specifications. The weight of the evidence does not show the original design specifications for NS1 and EW1, including the bottom elevations, widths, slopes, and other pertinent specifications typically prescribed in original designs. However, the evidence does show the original condition of NS1 and EW1 immediately before their excavation. More dredging was done than was necessary to restore NS1 and EW1 to their original condition before the excavation.

10.2(a)(4) Natural Barrier

257. The exemptions in Section 403.813(2)(f) and Rule 40C-4.051(11)(b) do not apply to the removal of a natural barrier separating a canal from adjacent wetlands or other surface waters. The term "barrier" is not defined in Sections 373.403 or 403.803; or in

Rule 40C-4.021. The term must be defined by its common and ordinary meaning.

258. A barrier is something that acts to hinder or restrict. The high spots that existed in NS1 and EW1 before their excavation functioned as control elevations. The high spots were natural barriers during low-flow conditions, during dry conditions in normal and wet years, and during dry years. They acted to hinder or restrict the flow of water through EW1 and NS1 into adjacent wetlands and eventually to other surface water through the Addison Canal west toward the St. Johns River. The 3-4 foot wall of water that flowed down NS1 to SR 50 immediately after the excavation in 1997 provided vivid evidence of the effectiveness of the high spots that formed two-foot barriers before the excavation.

259. The excavation did not use control devices which prevented deleterious substances from discharging into adjacent waters during maintenance dredging. The term "waters" is defined

* * *

was not excluded from the definition of maintenance in Section 373.403(8) and Rule 40C-4.021(20).

552. However, a substantial part of the time and expense related to routine custodial maintenance was attributable to the District's attempt to limit maintenance exemptions to routine custodial maintenance. The effort to limit exemptions to routine custodial maintenance needlessly extended an

already long and arduous proceeding, wasted administrative resources of the state, and imposed undue expense and financial burdens on Respondents.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that Respondent enter a final order upholding the Emergency Order and directing Modern to undertake and complete, in a reasonable time and manner, the corrective actions described in the Administrative Complaint.

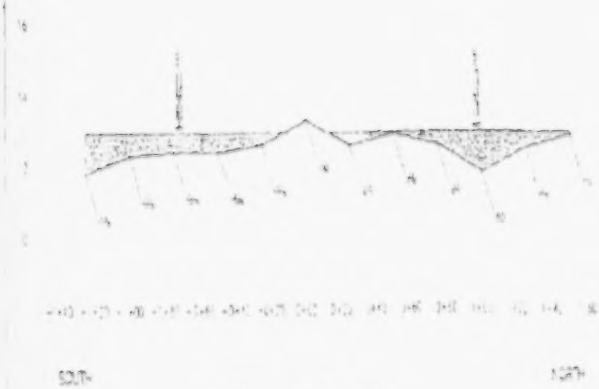
DONE AND ENTERED this 15th day of June, 1999, in Tallahassee, Leon County, Florida.

/s/ Daniel Manry
DANIEL MANRY
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the Division of Administrative Hearings this 15th day of June, 1999.

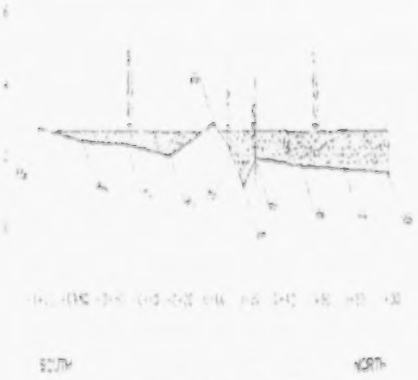
* * *

CROSS SECTION Nos. E5 & E6
BAY 15 DITCH
WEST OF I-27



SOUTH NORTH

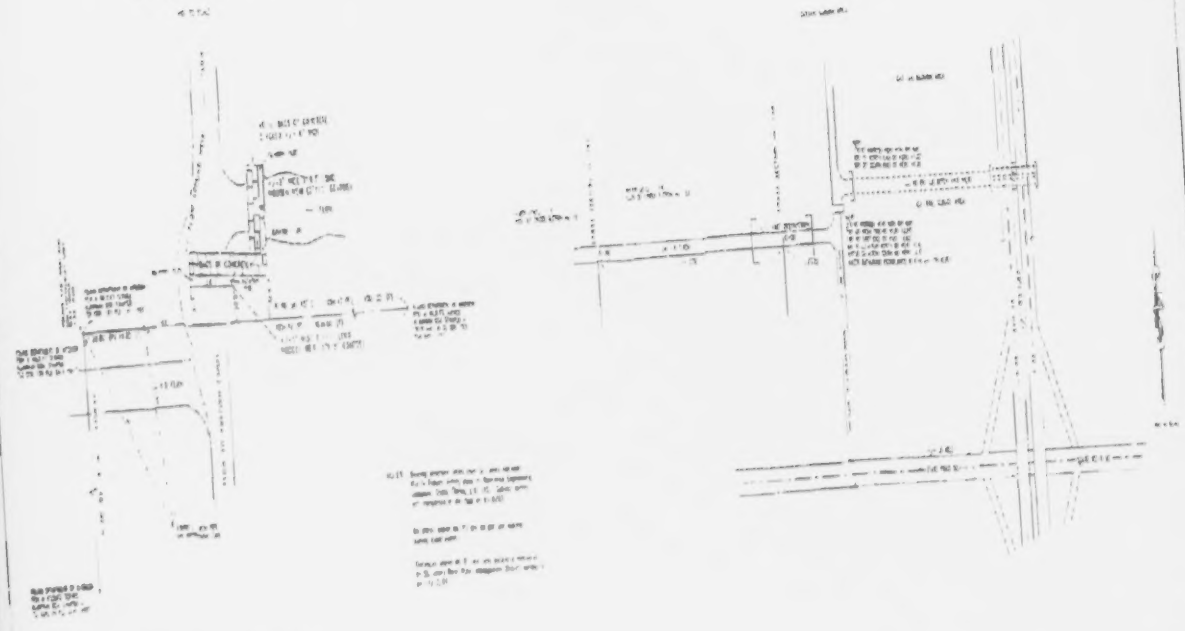
CROSS SECTION No. E5



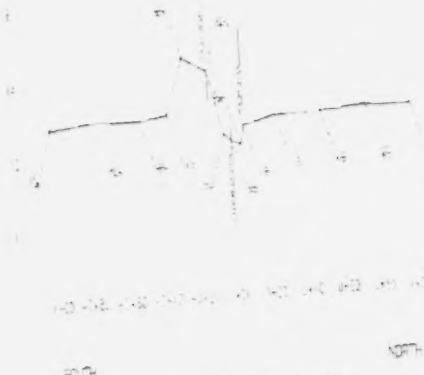
SOUTH NORTH

CROSS SECTION No. E6

DETAIL OF WEIR AREA



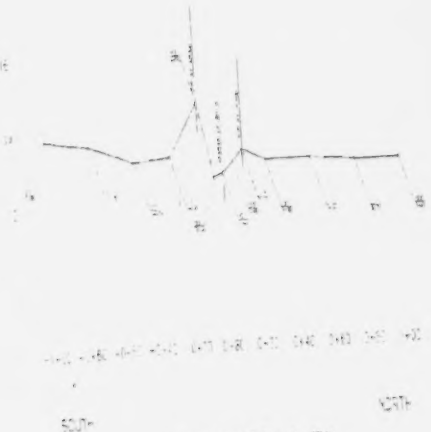
CROSS SECTIONS No 157 & 153
WEST OF EW 10 DITCH WEIR



SOUTH

NORTH

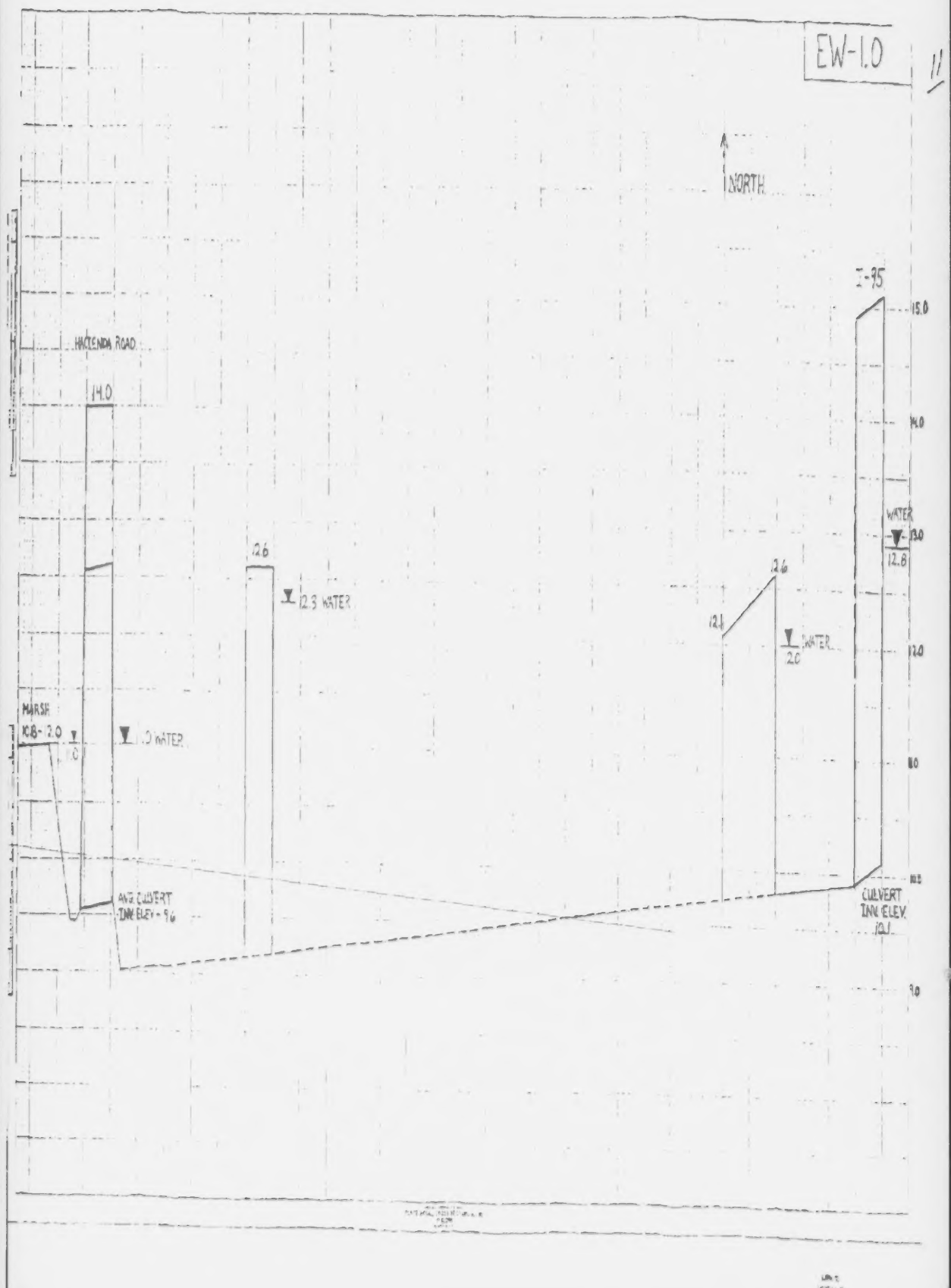
CROSS SECTION No 157

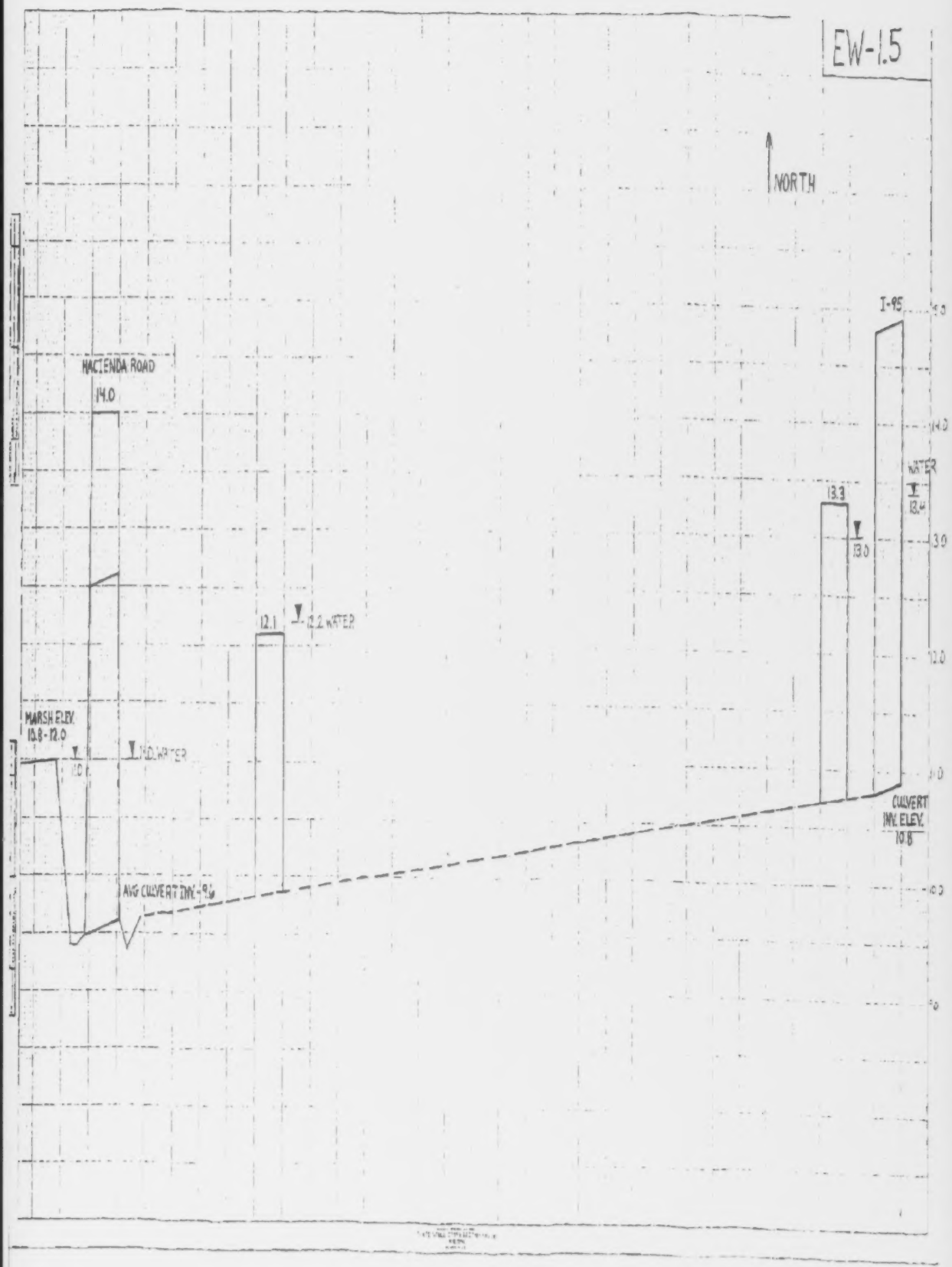


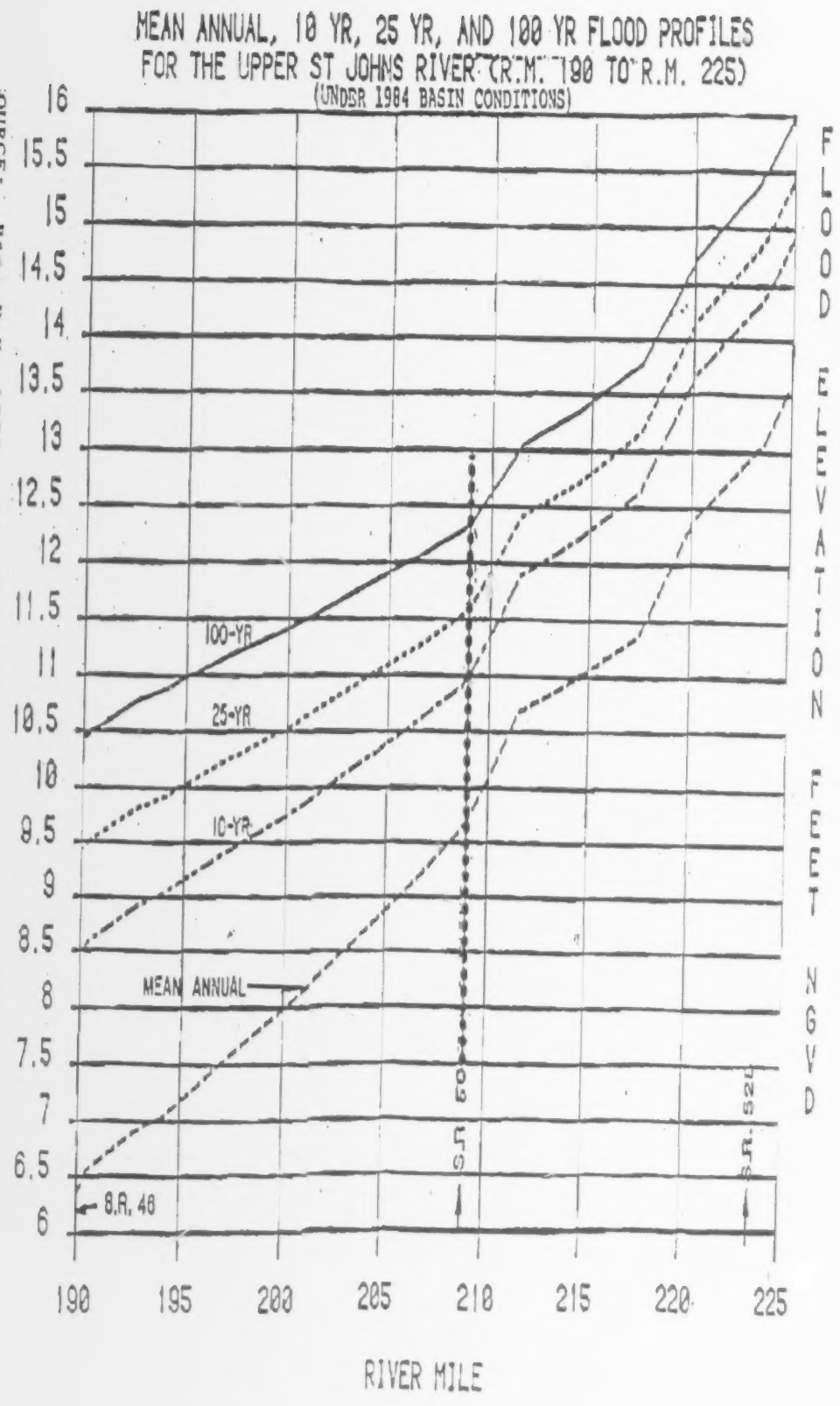
SOUTH

NORTH

CROSS SECTION No 153


EW-1.0
NORTH
I-95
HACIENDA ROAD
14.0
12.6
12.3 WATER
MARSH
10.8-12.0
WATER
AND CULVERT
INV. ELEV. - 9.6
12.6
12.4
WATER
12.0
WATER
12.8
CULVERT
INV. ELEV.
10.1
15.0
14.0
13.0
12.0
11.0
10.0
9.0


EW-1.5
NORTH
I-95
HACIENDA ROAD
14.0
WATER
13.4
13.3
13.0
12.1
12.2 WATER
MARSH ELEV.
12.8 - 12.0
N.D. WATER
AVG CULVERT INV. -9.6
CULVERT
INV. ELEV.
10.8



SOURCE: Rao, D.V. 1985. St. Johns River Water Management District. Technical Publication SJ 85-3

Page 9

Figure 3

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

MODERN, INCORPORATED, a Florida Corporation and FIRST OMNI SERVICE CORPORATION, a Florida Corporation,

Plaintiffs,

vs.

Case No.: 6:03-CV-718-ORL-31DAB

STATE OF FLORIDA, DEPARTMENT OF TRANSPORTATION, ST. JOHNS RIVER WATER MANAGEMENT DISTRICT, and UNITED STATES FISH AND WILDLIFE SERVICE,

Defendants.
_____/

FOURTH AMENDED COMPLAINT

(Filed May 17, 2004)

PLAINTIFFS, MODERN, INCORPORATED ("MODERN") and FIRST OMNI SERVICE CORPORATION ("FIRST OMNI"), (collectively the "PLAINTIFFS"), through their undersigned counsel, hereby sue DEFENDANTS, STATE OF FLORIDA, DEPARTMENT OF TRANSPORTATION ("FDOT"), ST. JOHNS RIVER WATER MANAGEMENT DISTRICT ("ST. JOHNS"), and UNITED STATES

FISH AND WILDLIFE SERVICE ("USFWS"), and aver:

The Parties

1. MODERN is a Florida corporation whose principal place of business is located in Brevard County, Florida.

2. FIRST OMNI is a Florida corporation whose principal place of business is located in Brevard County, Florida.

3. FDOT is an agency of the State of Florida that maintains offices and engages in business in Brevard County, Florida.

4. ST. JOHNS is a water management district created pursuant to chapter 373, Florida Statutes (2003), and engages in business in Brevard County, Florida.

5. USFWS is a subagency of the United States Department of the Interior that maintains offices and engages in business in Brevard County, Florida.

Jurisdiction and Venue

6. This case was originally brought in the Brevard County Circuit Court pursuant to Article V, section 20(c)(3), Florida Constitution and section 26.012, Florida Statutes (1997). The case was removed to this Court pursuant to title 28 United States Code section 1441 (2000). This Court has

jurisdiction pursuant to title 28 United States Code section 1346 (2000) and title 28 United States Code section 1367 (2000). Pursuant to title 28 United States Code section 2409a (2000), this Court has exclusive jurisdiction over Count IV, which seeks to quiet title in the drainage easements that exist over the St. Johns National Wildlife Refuge, which is owned by the United States Fish and Wildlife Service (the "Refuge").

7. Venue is proper in this Court pursuant to title 28 United States Code section 1391(b) (2000) because: (i) the Defendants are located in the Middle District of Florida; (ii) the property in this case is located in the Middle District of Florida; and (iii) all or substantially all of the events alleged in the Complaint occurred in the Middle District of Florida.

ALLEGATIONS COMMON TO ALL COUNTS

The Property

8. MODERN is the record owner of approximately 120 acres of property located near Titusville, Brevard County, Florida, in and near the intersection of interstate 95 and State Road 50. The property is more particularly described in the attached **Exhibit "A"** and is incorporated herein by reference.

9. MODERN acquired title to the 120 acres of property through a series of warranty deeds. Copies of those warranty deeds are attached as **Exhibit "B"** and are incorporated herein by reference.

10. FIRST OMNI is the record owner of approximately 10 acres of property located in North Brevard County. This property is more particularly described in the attached **Exhibit "C"** and is incorporated herein by reference.

11. FIRST OMNI is also the record owner of a 12.5-acre tract of property acquired by warranty deed and tax deed. A copy of these deeds is attached as **Exhibit "D"** and is incorporated herein by reference.

12. The 120, 12.5, and 10-acre tracts are hereafter referred to collectively as "the Property." The Property has been zoned for commercial use under the Brevard County Land Development Code since 1967. The property has traditionally been dry uplands and, therefore, suitable for development.

The Drainage Canal System

13. The Property had traditionally been dry land due to the presence of an extensive drainage canal system that was dug to serve a large land area east of Titusville along the St. Johns River, including the Property (the "Drainage System"). The Drainage System allowed water collecting on the Property to drain south and west into the St. Johns River. The Drainage System had existed and functioned for over. fifty (50) years.

14. The Drainage System is established pursuant to the Plat of Titusville Fruit and Farmlands Co. as recorded in Plat Book 2, Page 29, of

the Public Records of Brevard County (the "Plat") on April 14, 1914. This Plat establishes numerous rights-of-way to be used for access and drainage of the platted lots, including the Property. A copy of the Plat is attached as **Exhibit "F,"** and is incorporated herein by reference.

15. The rights-of-way identified in the Plat are dedicated to the public for access, drainage, and other purposes. The Drainage System and the "reclamation" of the lands encompassed within the Plat for productive use was deemed a public benefit during the entire time that the Drainage System was constructed, expanded, operated, and maintained.

16. The Drainage System historically also included two large east-west canals: one on the south side and one on the north side of State Road 50, which also serve to drain the Property.

17. The PLAINTIFFS enjoy such express, implied, and common law drainage easement rights in the Drainage System encompassed within the Plat as are necessary to drain the Property so as to permit the Property to be developed for productive use. The express drainage easement rights enjoyed by MODERN are identified in the documents attached as Composite **Exhibit "G"** and are incorporated herein by reference.

18. Composite **Exhibit "G"** consists of a warranty deed dated April 3, 1957 transferring the property now owned by MODERN to MODERN's immediate predecessors in title, Robert T. David and

Robert C. Fox. This document contains the following express language:

> That the parties mutually have the right to enter on any part of the adjoining lands from time to time for the purpose of keeping the drainage ditches open and to work the roads.

19. **Exhibit "G"** also includes a warranty deed wherein the Titusville Fruit and Farmlands Company obtained title to the property depicted on the Plat that MODERN subsequently acquired.

20. **Exhibit "G"** also includes a TRW-Ready Map depicting express drainage easements in the affected area.

21. **Exhibit "G"** also includes a warranty deed conveying the lots upon which ST. JOHNS' Emergency Order authorizes the construction of the weirs and the deed contains the following express language: "Subject to right-of-way as shown by plat for public roads and excepting rights-of-way for necessary drainage ditches."

22. The PLAINTIFFS have vested rights in the drainage easements described above, which the PLAINTIFFS have never abandoned, abrogated, or vacated.

USFWS's Acquisition of the Refuge

23. USFWS took title to approximately 4000 acres of land located within the Refuge in the 1970's for the purpose of preserving critical habitat for the

then endangered, now extinct, Dusky Seaside Sparrow.

24. **Exhibit "G"** includes a map of the Refuge prepared by USFWS depicting existing and functioning ditches in the affected area and the direction of flow of water through those ditches. The USFWS acquired title to the Refuge on the property that contains a large portion of the Drainage System, including that which serves the Property. The Refuge was taken by eminent domain. The order of taking of the Refuge contained an express reservation for express drainage easements located in the affected area.

25. The last known Dusky Seaside Sparrow died in captivity in Orlando in 1987. Since 1987, the USFWS has maintained the Refuge for the ostensible purpose of creating wildlife habitat by restoring the natural hydroperiod and fire regime affecting the St. Johns River floodplain that existed before the Titusville Fruit and Farmlands Company created the Drainage System. To accomplish such a result, USFWS has either filled or blocked, or allowed to be filled or blocked by various government entities such as ST. JOHNS and FDOT, the Drainage System within the Refuge. As is set forth more particularly hereafter, these activities have significantly impeded the flow of surface waters through the Drainage System causing flooding of the Property.

The Destruction of the Drainage System

26. In 1982, FDOT partially filled in the canal along the north side of State Road 50 between the St. Johns River and I-95. This canal served, in part, to drain the Property.

27. Between 1991 and 1993, FDOT filled in 4.5 miles of the existing drainage ditches within the Drainage System in connection with providing mitigation for the wetland impacts of its widening of State Road 50. These ditches served, in part, to drain the Property.

28. ST. JOHNS issued a permit authorizing the filling of the ditches.

29. In connection with its widening of State Road 50, FDOT also filled in the canal located along the south side of State Road 50 between the St. Johns River and I-95. The old canal served, in part, to drain the Property. While it replaced the old canal with a new canal, the new canal had substantially less drainage conveyance capacity than the old canal.

30. ST. JOHNS issued a permit authorizing the filling-in and replacement of the canal along the south side of State Road 50.

31. FDOT, by its above-described actions, has caused the continuous or frequent physical invasion of PLAINTIFFS' drainage easements and the impoundment of surface waters on the Property so as to flood the Property and so as to raise the groundwater on the Property, the effect of which is to

deprive PLAINTIFFS of the economically beneficial use of its Property and its appurtenant drainage easements.

32. ST. JOHNS, by its above-described actions, has authorized the continuous or frequent physical invasion of PLAINTIFFS' easements and the impoundment of surface waters on the Property so as to flood the Property and so as to raise the groundwater on the Property the affect of which is to deprive PLAINTIFFS of the economically beneficial use the Property and appurtenant drainage easements.

The Flooding

33. PLAINTIFFS first began to discover the effects of the FDOT and ST. JOHNS actions in 1995 and 1996. They immediately began efforts to alleviate the problem and prevent future flooding.

34. From 1996 to 1997, PLAINTIFFS attempted to negotiate with ST. JOHNS and FDOT to abate the flooding. ST. JOHNS rejected any possibility of restoring the Drainage System to its pre-filled condition so as to prevent flooding of the Property.

35. In February of 1997, the PLAINTIFFS cleaned out portions of several ditches within the Drainage System bordering the Property in order to relieve the flooding. PLAINTIFFS did so based on the good-faith belief that this activity did not require a permit from St. Johns under chapters 373 or 403,

Florida Statutes (2003), because such activity was considered exempt maintenance of an existing drainage ditch.

36. After discovering PLAINTIFFS' maintenance activities, ST. JOHNS, at the request of USFWS, issued an emergency order directing that PLAINTIFFS cease clearing out the drainage ditches (the "Emergency Order") within the Drainage System.

37. The Emergency Order authorized USFWS to place two earthen weirs within portions of the Drainage System that bordered MODERN's property. The weirs were intended to prevent the flow of surface water off of the Property that historically drained from the Property, through the Refuge, and into the St. Johns River.

38. On August 20, 1997, ST. JOHNS filed an Administrative Complaint and proposed order requiring MODERN to undo all ditch maintenance which had PLAINTIFFS previously had performed and required MODERN to permanently maintain water levels on the Property that exceed the 100 year flood elevation of the St. Johns River.

39. The scope and magnitude of the flooding continues to increase and substantial portions of the Property are being converted from dry land to marshy wetlands which did not previously exist.

The Court Action

40. On May 19, 1997, PLAINTIFFS filed a complaint in the Eighteenth Judicial Circuit of the State of Florida in and for Brevard County, Florida, seeking damages for the flooding of the Property, inverse condemnation, and injunctive relief to prevent fixture flooding of the Property.

41. On January 9, 1998, the Circuit Court entered an order dismissing PLAINTIFFS' complaint and requiring PLAINTIFFS to exhaust their administrative remedies under Chapter 120, Florida Statutes (1998), before proceeding further. The Circuit Court subsequently entered an order holding the Circuit Court case in abeyance until that was accomplished.

42. The PLAINTIFFS have exhausted the administrative remedies as the Circuit Court required.

43. All conditions precedent to maintaining this cause of action has been met, excused, waived or have otherwise occurred.

***England* and *Jennings* Reservation**

44. The PLAINTIFFS specifically reserve their claim for inverse condemnation under the United States Constitution pursuant to *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1994); *Fields v. Sarasota-Manatee Airport Authority*, 953 F. 2d 1299 (11th Cir. 1982) and *Jennings v. Caddo*

Parish School Board, 531 F. 2d 1331, 1332 (5th Cir. 1976).

COUNT I
INVERSE CONDEMNATION AGAINST ST. JOHNS

45. PLAINTIFFS reallege and incorporate the allegations contained in paragraphs 1 through 44.

46. This is a cause of action for inverse condemnation against ST. JOHNS, and not against FDOT or USFWS, seeking full compensation for the taking of the Property.

47. ST. JOHNS, by its above-described actions, has authorized the continuous or frequent physical invasion of PLAINTIFFS' easements and the impoundment of surface waters on the Property so as to flood the Property and so as to raise the groundwater on the Property the affect of which is to deprive PLAINTIFFS of the economically beneficial use the Property and appurtenant drainage easements.

48. ST. JOHNS's actions were intended to serve a public purpose.

49. ST. JOHNS has failed and refuses to pay full compensation for the taking resulting from its actions.

WHEREFORE, PLAINTIFFS respectfully request that this Honorable Court:

a. Grant PLAINTIFFS a bench trial on the taking issue on an expedited basis;

b. Declare that ST. JOHNS has taken the Property without just compensation;

c. Declare the date of such taking;

d. Enter an order of taking as to the Property pursuant to chapter 73 and 74 of the Florida Statutes (2003);

e. Require ST. JOHNS to deposit a good faith estimate of value, plus interest from the date of taking, in the Registry of the Court to secure PLAINTIFFS for the property taken during the pendency of this case;

f. Impanel a jury of (12) persons to determine the amount of compensation to which PLAINTIFFS should be awarded for the taking of the Property by ST. JOHNS;

g. Award PLAINTIFFS pre-judgment interest, as appropriate, and reasonable attorneys' fees and costs in accordance with chapters 73 and 74 of the Florida Statutes; and

h. Grant such other and further relief as this Honorable Court determines to be equitable, just, proper, and necessary under the circumstances.

COUNT II
INVERSE CONDEMNATION AGAINST FDOT

50. PLAINTIFFS reallege and incorporate the allegations contained in paragraphs 1 through 44.

51. This is a cause of action for inverse condemnation against FDOT, and not against ST. JOHNS or USFWS, seeking full compensation for the taking of the Property.

52. FDOT, by its above-described actions, has caused the continuous or frequent physical invasion of PLAINTIFFS' drainage easements and the impoundment of surface waters on the Property so as to flood the Property and so as to raise the groundwater on the Property the effect of which is to deprive PLAINTIFFS of the economically beneficial use of its Property and its appurtenant drainage easements.

53. FDOT's actions were intended to serve a public purpose.

54. FDOT has failed and refuses to pay full compensation for the taking of the Property.

WHEREFORE, PLAINTIFFS respectfully request that this Honorable Court:

a. Grant PLAINTIFFS a bench trial on the taking issue on an expedited basis;

b. Declare that FDOT has taken the Property without just compensation;

c. Declare the date of such taking;

d. Enter an order of taking as to the Property pursuant to chapters 73 and 74 of the Florida Statutes;

e. Require FDOT to deposit a good faith estimate of value, plus interest from the date of taking in the Registry of the Court to secure PLAINTIFFS for the property taken during the pendency of this case;

f. Impanel a jury of (12) persons to determine the amount of compensation to which PLAINTIFFS should be awarded for the taking of the Property by FDOT;

g. Award PLAINTIFFS pre-judgment interest as appropriate, and reasonable attorneys' fees and costs in accordance with shapters 73 and 74 of the Florida Statutes; and

h. Grant such other and further relief as this Honorable Court determines to be equitable, just, proper, and necessary under the circumstances.

COUNT III
DECLARATORY RELIEF AGAINST ST. JOHNS AND FDOT

55. PLAINTIFFS reallege and incorporate the allegations contained in paragraphs 1 through 44.

56. This is an action for declaratory relief being brought pursuant to Chapter 86, Florida Statutes

(2003), against ST. JOHNS and FDOT, and not USFWS.

57. As indicated in the preceding paragraphs, the PLAINTIFFS have enjoyed certain drainage easements in drainage canals and ditches depicted on the Plat of the Titusville Fruit and Farm Lands Subdivision, a copy of which is attached as **Exhibit "E."**

58. ST. JOHNS and FDOT either dispute that the PLAINTIFFS have express, implied, or common law drainage easement rights in the drainage canals and ditches or dispute the ability of the PLAINTIFFS to utilize the drainage easements.

59. ST. JOHNS and FDOT also disagree with the PLAINTIFFS' assertions as to the location and extent of the drainage easements enjoyed by the PLAINTIFFS in the Drainage System.

60. As a result, a real and actual controversy exists that necessitates this declaratory judgment action.

WHEREFORE, the PLAINTIFFS respectfully request this Court grant the following relief:

a. Declare the existence, location and extent of the PLAINTIFFS' express easements;

b. Declare the existence, location and extent of the PLAINTIFFS' common law easements;

c. Declare the existence, location and extent of the PLAINTIFFS' implied easements;

d. Grant an award of costs to the PLAINTIFFS for being compelled to bring this action;

e. Grant such other and further relief as this Court deems just and proper.

COUNT IV – ACTION UNDER FEDERAL QUIET TITLE ACT AGAINST USFWS

61. PLAINTIFFS reallege and incorporate the allegations contained in paragraphs 1 through 44.

62. This is an action against USFWS, and not ST. JOHNS or FDOT, pursuant to Title 28 United States Code section 2409a (2000), to quiet title to the PLAINTIFFS' drainage easements with the Drainage System located within the Refuge.

63. Since the platting of the Titusville Fruit and Farm Lands Subdivision, PLAINTIFFS, or their predecessors in title, have enjoyed express, common law, and implied easements within the Drainage System, which drain surface waters off of the Property, across the Refuge, and into the St. Johns River.

64. The USFWS took title to the Refuge subject to these drainage easements. (see attached Composite **Exhibit "G"**).

65. Since it acquired the Refuge, the USFWS has interfered with PLAINTIFFS' drainage easements in the Drainage System by: (i) filling in or blocking portions of the Drainage System; (ii) allowing FDOT to fill in approximately 4.5 miles of the Drainage System lying within the Refuge; and (iii) by constructing earthen weirs within the Drainage System pursuant to the emergency order, as more particularly described above.

66. By virtue of the interference and disregard of the PLAINTIFFS' easement interests, the USFWS disputes the existence or location, scope and extent of the PLAINTIFFS' drainage easements in the Drainage System.

67. An actual and concrete controversy exists between USFWS and the PLAINTIFFS, which needs adjudication before this Court.

WHEREFORE, the PLAINTIFFS respectfully request this Court grant the following relief:

a. Adjudicate that the USFWS took title to the Refuge subject to the PLAINTIFFS' express, common law, and implied drainage easements;

b. Adjudicate the existence, location, scope and extent of the PLAINTIFFS' drainage easements in the Drainage System;

c. Adjudicate that the USFWS has interfered with the PLAINTIFFS' easement interests;

d. Award the PLAINTIFFS its cost of being compelled to bring this action;

e. Grant such other and further relief as this Court deems just and proper.

COUNT V – PERMANENT INJUNCTIVE RELIEF AGAINST ST. JOHNS AND FDOT FOR TRESPASS

68. PLAINTIFFS reallege and incorporate the allegations contained in paragraphs 1 through 44.

69. This is an action for permanent injunctive relief against ST. JOHNS and FDOT, and not USFWS, preventing FDOT and ST. JOHNS from interfering with the functioning of the Drainage System so as to flood the Property, and requiring ST. JOHNS and FDOT to abate the flooding of the Property.

70. This action is being pled in the alternative.

71. As is more particularly described above, ST. JOHNS and FDOT's actions have caused, are causing, and will continue to cause flooding of the Property and interference with the drainage easements enjoyed by the PLAINTIFFS.

72. The flooding and interference with PLAINTIFFS' drainage easements is unauthorized and without justification. PLAINTIFFS have not granted permission or consent to such flooding. As such, it constitutes a continuing trespass by FDOT

and ST. JOHNS against the Property and PLAINTIFFS' drainage easements.

73. PLAINTIFFS have no adequate remedy at law because PLAINTIFFS have no action for damages against ST. JOHNS for its regulatory actions under section 373.443, Florida Statutes, and because the amount of damages recoverable against FDOT are limited by section 768.28 Florida Statutes and wholly inadequate to fully compensate PLAINTIFFS for their damages.

74. PLAINTIFFS will suffer irreparable harm if the relief requested herein is not granted. This irreparable harm includes, but is not limited to, interference with the use and enjoyment of the Property which is unique and material in character and includes interests that cannot be adequately compensated for by the payment of money.

75. The issuance of a permanent injunction would be beneficial and not contrary to the public's best interest in that the public has a clear interest in protection of private property rights and ensuring that those rights are not trampled upon by any government entity and that private property is not flooded.

WHEREFORE, the PLAINTIFFS respectfully request this Court grant the following relief:

a. Enjoin ST. JOHNS and FDOT from interfering with PLAINTIFFS' use of the Drainage System to drain the Property;

b. Direct ST. JOHNS and FDOT to restore, or permit others to restore, the Drainage System so as to abate the flooding of the Property;

c. Award in PLAINTIFFS favor its costs of bringing this action; and

d. Such other and further relief as this Court deems just and proper.

DEMAND FOR JURY TRIAL

76. PLAINTIFFS hereby demand trial by jury on all issue so triable.

BRICKLEMYER SMOLKER & BOLVES, P.A.

By: /s/ Ethan Loeb

David Smolker
Fla. Bar No. 349259
Matthew C. Lucas
Fla. Bar No. 344834
Ethan J. Loeb
Fla. Bar No. 668338
500 East Kennedy Boulevard,
Suite 200
Tampa, Florida 33602
(813) 223-3888
Attorneys for PLAINTIFFS
MODERN, INC. and
FIRST OMNI SERVICE CORP.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Fourth Amended Complaint was furnished by U.S. Mail, this 13th day of May, 2004 to:

William H. Congdon, Esq.
Stanley J. Niego, Esq.
St. Johns River Water Management District
Post Office Box 1429
Palatka, Florida 32178-1429

Walter Kelly, Esq.
Florida Department of Transportation
605 Suwannee Street
Room MS-58
Tallahassee, FL 32399-0458

Samuel D. Armstrong
Assistant U.S. Attorney
Office of the U.S. Attorney
Middle District of Florida
80 N. Hughey Avenue, Suite 201
Orlando, FL 32801

Allan P. Whitehead, Esq.
Frese, Nash & Hansen, P.A.
930 South Harbor City Boulevard
Suite 505
Melbourne, FL 32901

/s/ Ethan Loeb
David Smolker

131

(2)

No. 09-70

In The
Supreme Court of the United States

MODERN, INC., et al.,

Petitioners,

v.

ST. JOHNS RIVER WATER MANAGEMENT DISTRICT, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF FOR THE ST. JOHNS RIVER WATER MANAGEMENT DISTRICT IN OPPOSITION TO PETITION FOR CERTIORARI

WILLIAM H. CONGDON*
**Counsel of Record*
KATHRYN L. MENNELLA
ST. JOHNS RIVER WATER MANAGEMENT DISTRICT
4049 Reid Street
Palatka, FL 32177
(386) 329-4314
(386) 329-4485 (Facsimile)
Attorneys for Respondent

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

(1) Whether jurisdiction is lacking over this appeal because Modern seeks to assert an issue that is outside the scope of the trial proceedings and seeks to collaterally attack a final decision of the Florida courts in the administrative enforcement action, whereby it was determined that Modern was required to obtain a permit in order to excavate certain drainage ditches prior to draining its property.

(2) Whether inverse condemnation by flooding occurs under the Florida Constitution where a landowner ditches and drains flooded, wetland-containing property he purchased and, upon discovery of the unpermitted dredging, is required to obtain an after-the-fact permit or restore the illegal dredging.

(3) Whether this court should provide an advisory opinion as to the effect of *San Remo Hotel, L.P. v. City & County of San Francisco, California* on Modern's reserved federal takings claims.

(4) Whether an upper landowner enjoys a common law drainage easement under Florida law in drainage ditches existing on lower property.

(5) Whether this court should entertain a claim of "judicial taking" that was not raised below.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES v

STATEMENT OF THE FACTS AND CASE..... 1

REASONS FOR DENYING THE PETITION 10

I. THIS COURT LACKS JURISDICTION BECAUSE MODERN FAILED TO TIMELY APPEAL ITS REGULATORY TAKING CLAIM TO THE FLORIDA SUPREME COURT AND THIS COURT AFTER THE *MODERN* STATE COURT DECISION, AND BECAUSE MODERN'S REGULATORY TAKING CLAIM IS OUTSIDE THE SCOPE OF THE PROCEEDINGS BELOW 10

II. INVERSE CONDEMNATION BY FLOODING DOES NOT OCCUR UNDER THE FLORIDA CONSTITUTION WHERE A LANDOWNER PURCHASES FLOODED, WETLAND-CONTAINING PROPERTY, DITCHES AND DRAINS THE LAND, AND, UPON DISCOVERY, IS REQUIRED TO OBTAIN AN AFTER-THE-FACT PERMIT OR RESTORE THE ILLEGAL DREDGING 12

A. The Petition Requires Review of Factual Findings and the Application of State Law to the Facts 12

TABLE OF CONTENTS – Continued

Page

B. *Loretto* and Its Progeny Do Not Conflict With the Decision Below 14

C. There Is No Legal Right Under Florida Law to Immediately Abate Flooding..... 19

III. THIS COURT NEED NOT OFFER AN ADVISORY OPINION AS TO THE EFFECT OF *SAN REMO HOTEL, L.P. v. CITY & COUNTY OF SAN FRANCISCO, CALIFORNIA,* ON MODERN'S RESERVED FEDERAL TAKINGS CLAIMS..... 22

IV. THE DECISION BELOW PROPERLY REFUSED TO QUIET TITLE IN MODERN'S FAVOR TO A NONEXISTENT FLORIDA COMMON LAW DRAINAGE EASEMENT IN DITCHES ON THE LOWER PROPERTY 23

A. The Issue Involves Only State Law and is Not of Constitutional Dimensions 24

B. Under Florida Law, An Upper Landowner Does Not Enjoy A Common Law Drainage Easement to Improve and Maintain Drainage Ditches Across The Lower Owner's Property 25

TABLE OF CONTENTS – Continued

Page

V. THERE COULD NOT BE A JUDICIAL TAKING BECAUSE AN UPPER LANDOWNER DOES NOT ENJOY A COMMON LAW DRAINAGE EASEMENT UNDER FLORIDA LAW IN DRAINAGE DITCHES EXISTING ON LOWER PROPERTY, EVEN ASSUMING SUCH A TAKING CLAIM EXISTS AND IT PROPERLY COULD BE BROUGHT HERE FOR THE FIRST TIME IN THIS APPEAL 33

CONCLUSION 35

TABLE OF AUTHORITIES

Page

CASES

Allegheny City General Hospital v. NLRB, 608 F.2d 965 (3rd Cir. 1979) 15

Azul Pacifico, Inc. v. City of Los Angeles, 948 F.2d 575 (9th Cir. 1991) 17, 18

Boise Cascade Corp. v. U.S., 296 F.3d 1339 (Fed. Cir. 2002) 17, 18

Braxton v. U.S., 500 U.S. 344 (1991) 25

Duval v. Thomas, 114 So. 2d 79 (Fla. 1959) 27

Edason v. Denison, 142 Fla. 101, So. 342 (Fla. 1940) 30

F.C.C. v. Florida Power Corp., 480 U.S. 245, 107 S.Ct. 1107 (1987) 15

Glisson v. Alachua County, 558 So. 2d 1030 (Fla. 1st DCA 1990), *rev. denied*, 570 So. 2d 1304 (Fla. 1990) 17

Gus Machado Buick, Inc. v. Westland Skating Center, Inc., 542 So. 2d 959 (Fla. 1989) ... 25, 29, 30, 31

Lamb v. Dade County, 159 So. 2d 477 (Fla. 3d DCA 1964) 31, 32

Lingle v. Chevron U.S.A. Inc., 544 U.S. 528 (2005) 15

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) ..... *...passim*

McDonald, Sommer & Frates, 106 S.Ct. 2561 (1986) 17

TABLE OF AUTHORITIES – Continued

Page

North Carolina v. Rice, 404 U.S. 244 (1971) 23

Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co., 429 U.S. 363 (1977) 24, 33

Palazzolo v. Rhode Island, 533 U.S. 606 (2001).....16, 34, 35

President of the Corporation of Jesus Christ of Latter-Day Saints v. St. Johns River Water Management District, 489 So. 2d 59 (Fla. 5th DCA 1986) 5

Rubano v. Dept. of Transp., 656 So. 2d 1264 (Fla. 1995) 13

St. Johns River Water Management Dist. v. Modern, Inc., 784 So. 2d 464 (Fla. 1st DCA 2001) 5, 6, 9, 11

San Remo Hotel v. City and County of San Francisco, 545 U.S. 323 (2005).....22

Seminole County v. Mertz, 415 So. 2d 1286 (Fla. 5th DCA 1982), *rev. denied*, 424 So. 2d 763 (Fla. 1982) 29, 30

South Florida Water Management Dist. v. Basore of Florida, Inc., 723 So. 2d 287 (Fla. 4th DCA 1998).....12

Southwest Florida Water Management Dist. v. Charlotte County, 774 So. 2d 903 (Fla. 2d DCA 2001) 21

Stoll v. MacPherson Duck Club, Ltd., 607 P.2d 1019 (Colo. Ct. App. 1979) 32

TABLE OF AUTHORITIES – Continued

Page

Taylor v. City of Riviera Beach, 801 So. 2d 259 (Fla. 4th DCA 2001), *rev. denied*, 821 So. 2d 293 (Fla. 2002) 17

U.S. v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985) 16

Village of Tequesta v. Jupiter Inlet Corp., 371 So. 2d 663 (Fla. 1979) 21

Wester v. Rigdon, 110 So. 2d 470 (Fla. 1st DCA 1959) 21

Yee v. City of Escondido, Cal., 503 U.S. 519 (1992) 15

STATUTES

Chapter 120, Fla. Stat. 3

Chapter 373, Fla. Stat. 20, 21, 26

Section 2.01, Fla. Stat. 20, 21, 26, 27

Section 373.403(5), Fla. Stat. 4

Section 373.413, Fla. Stat. 3, 4, 5

Section 373.416, Fla. Stat. 3, 4, 5

Sections 403.813(f) and (g), Fla. Stat. 5

FEDERAL STATUTES

28 U.S.C. §1738 22

28 U.S.C. §2409(a) 6, 24

TABLE OF AUTHORITIES – Continued

Page

RULES

Rule 40C-4.021(26), Florida Administrative Code 4

Rule 40C-4.041(2)(b)2, Florida Administrative Code 4

COURT RULES

Supreme Court Rule 10 ..... 14, 22

Supreme Court Rule 15 19

OTHER

1884 Blackstone *Commentaries on the Laws of England* 25, 26, 27

F. Maloney, S. Plager, R. Ausness, B. Canter, *Florida Water Law* 617 (1980) 29, 30

STATEMENT OF THE FACTS AND CASE

This case involves a landowner who purchased flooded, wetland-containing property, drained the property without a permit, and then claimed that St. Johns' enforcement of Florida's permitting regulations constituted a flood-taking of the illegally drained property.

Modern owns property, purchased in 1991, that is located adjacent to the southeast corner of the St. Johns National Wildlife Refuge (the "Refuge"). (Amended Memorandum Opinion, Doc. 458, at 4-5; hereafter "Opinion"). In its natural state, the property Modern purchased was wetlands because it is part of the St. Johns River flood plain. *Id.* at 29. That flood plain tract from which Modern deraigned title "consisted largely of flat marshland." *Id.* at 2. In the early 1900s, the floodplain was ditched and drained by a land development company. *Id.* at 2, 29. The last evidence of ditch maintenance was in 1958. *Id.* at 29. After 1958, the system of ditches began a natural process of erosion and degradation. *Id.* Without a functioning drainage system, most of Modern's property would be jurisdictional wetlands. *Id.* at 6.

Ditches EW1 and NS1 are "the essential drainage features" of Modern's property. *Id.* at 29. Flooding due to poor drainage is caused primarily by the blockages at EW1 and NS1 near their intersection. *Id.* at 28, n.30. The District Court expressly found "aerial photography *clearly shows* that occlusions existed at these locations [EW1 and NS1] in 1991

when Modern purchased the property." *Id.* (emphasis added). Significant portions of these ditches were obstructed, greatly reducing their ability to drain Modern's property. *Id.* at 7.

In January 1997, Modern dredged portions of EW1 and NS1 on and near its property. *Id.* EW1 was made wider and deeper from its intersection with NS1 a short distance to the east. *Id.* NS1 was made wider and deeper from a short distance north of EW1 all the way south to State Road 50. *Id.* The dredging was "extremely effective, moving a tremendous volume of water off of Modern's property." *Id.* The water first moved west through newly excavated EW1 and then to the south through newly excavated NS1. *Id.* The dredging eventually lowered water levels across hundreds of acres of open water and wetlands, primarily on the Refuge, but also on Modern's property. *Id.* Modern did not obtain a permit from St. Johns for its dredging of EW1 and NS1. *Id.* at 7.

The United States Fish and Wildlife Service ("USFWS") feared the lower water levels would harm species on the Refuge and complained to St. Johns. *Id.* On April 1, 1997, shortly after the illegal dredging was discovered, St. Johns sent Modern a letter advising Modern of its options for coming into compliance with Florida's statutes and rules. (Pl. Ex. A-116). Although one option was for Modern to apply for an after-the-fact permit for the dredging, *id.* at 2, Modern declined to do so. (T:184-185).

On May 14, 1997, St. Johns entered an Emergency Order that authorized USFWS to install earthen weirs in EW1 and NS1 to undo the effects of the unpermitted dredging. *Id.* at 7. USFWS then installed weirs on Refuge property in NS1 and EW1 at heights that would restore the ditches to the depths that existed just before Modern's unpermitted dredging – 11.7 feet in EW1 and 12.7 feet in NS1. *Id.*

On August 27, 1997, St. Johns filed an Administrative Complaint and Proposed Order (Pl. Ex. A-119), alleging that Modern excavated portions of EW1 and NS1 without a permit, and proposing as corrective action two ways in which Modern could effectively restore the pre-excavation depths of those ditches. *Id.* at 8. Modern administratively challenged both agency actions under Chapter 120, Florida Statutes (Florida's Administrative Procedure Act). The administrative law judge ("ALJ") issued his recommended order (Pl. Ex. A-281, Ex. 1; "Recommended Order"), which determined that Modern's dredging required a permit under the statutes and rules enforced by St. Johns and that Modern's failure to obtain a permit violated Florida law.[1]

---

[1] The ALJ accurately described St. Johns' surface water permitting program as follows:

> Pursuant to Sections 373.413 and 373.416, the District requires an environmental resource permit (a "permit") to assure that activities such as construction, alteration, maintenance, or operation, will not be

(Continued on following page)

> harmful to the water resources of the state and will be consistent with the overall objectives of the District.

(Recommended Order at ¶140). He ultimately found that Modern's excavation of EW1 and NS1 was a violation of those provisions:

> Pursuant to Sections 373.413 and 373.416, Modern was required to obtain a permit for the excavation of NS1, EW1, and the larger system in January 1997. Modern neither applied for nor obtained a permit for the excavation.
>
> Modern violated the permitting requirements authorized in Sections Chapter 373.413 and Chapter 373.416. Modern is subject to the proposed agency action in the Administrative Complaint.

(Recommended Order at ¶¶350-51). The support for this conclusion came from specific findings of fact made by the ALJ. The ALJ found that NS1, EW1, and the larger system are "works" as defined by section Chapter 373.403(5), Florida Statutes, because NS1 and EW1, and the larger system, are each:

> . . . artificial structures, including . . . ditches, canals, conduits, channels . . . and other construction that connects to, draws water from, drains water into . . . waters in the state.

(Recommended Order at ¶143). In addition, the ALJ found that NS1, EW1, and the larger system are each a "surface water management system" as defined in Rule 40C-4.021(26), Florida Administrative Code ("FAC"), because "works" are included within the definition of "surface water management system." (Recommended Order at ¶144). The ALJ also found that Rule 40C-4.041(2)(b)2, FAC, requires a permit for the construction, alteration, maintenance, or operation of a "surface water management system" if the system serves a project with a total land area equal to or exceeding forty acres, and that NS1 and EW1 each tripped this forty acre permitting threshold. (Recommended Order at ¶¶148-49). The ALJ ultimately found that Modern's dredging of EW1 and NS1 violated the permitting requirements

(Continued on following page)

The ALJ also rejected Modern's claim that its dredging of NS1 and EW1 was merely "routine custodial maintenance."[2] (Recommended Order at ¶386). To constitute "routine custodial maintenance," dredging can have no more than a minimal adverse environmental impact. *President of the Corporation of Jesus Christ of Latter-Day Saints v. St. Johns River Water Management District*, 489 So. 2d 59, 60-61 (Fla. 5th DCA 1986) ("the legislature intended to exclude only routine custodial maintenance having a minimal adverse environmental impact from permit requirements."). The ALJ found that Modern's unpermitted ditch excavation drained "approximately 600 to 800 acres of wetlands." (Recommended Order at ¶106). The draining of hundreds of acres of wetlands is not a "minimal adverse environmental impact."

The ALJ recommended to St. Johns' Governing Board that it enter a final order upholding the Emergency Order and proposed corrective actions. (Recommended Order at 187). The Governing Board adopted these recommendations in a single final order (Pl. Ex. A-281, Ex. A), which was affirmed "in all respects" by Florida's First District Court of Appeal. *St. Johns River Water Management Dist. v. Modern, Inc.*, 784 So. 2d 464 (Fla. 1st DCA 2001) (hereafter "the

---

authorized in sections Chapter 373.413 and Chapter 373.416, Florida Statutes. (Recommended Order at ¶351).

[2] The "routine custodial maintenance" of ditches and canals is exempt from St. Johns' permitting requirements under sections 403.813(f) and (g), Florida Statutes.

Modern decision"). Modern took no further judicial appeal of this decision. By July of 2003, Modern had substantially complied with the Final Order's restoration requirement by bulldozing excavated spoil back into NS1 so as to fill in 500 feet of NS1 just south of the intersection with EW1. (Opinion at 8-9).

In 2003, Modern filed a Second Amended Complaint in the Eighteenth Judicial Circuit of Florida against the State of Florida Department of Transportation ("FDOT"), St. Johns, and USFWS. (Doc. 4). USFWS removed the case to the United States District Court for the Middle District of Florida. (Doc. 1).

Modern then filed a Third Amended Complaint. (Doc. 45). All of the defendants moved to dismiss. (Doc. 46, 47 and 51). As to St. Johns, the court dismissed counts sounding in equal protection, due process, trespass, nuisance, and estoppel, and denied dismissal as to counts sounding in inverse condemnation and declaratory and injunctive relief. (Doc. 70).

Modern then filed the Fourth Amended Complaint (hereafter "Complaint") that is the subject of this appeal, asserting five counts, being: Count I (inverse condemnation as to St. Johns); Count II (inverse condemnation as to FDOT); Count III (declaratory relief as to St. Johns and FDOT); Count IV (quiet title as to USFWS under 28 U.S.C. §2409(a) to various types of alleged drainage easements over Refuge property) and Court V (injunctive relief against St. Johns and FDOT). (Doc. 71). Modern filed

for summary judgment against St. Johns (Doc. 289-1), which was denied in part and granted in part. (Doc. 318 at 28). St. Johns filed a motion for summary judgment against Modern (Doc. 204), which was granted as to Count III and denied in all other respects. (Doc. 330 at 15). St. Johns' motion asserted, *inter alia*, that Modern was seeking to assert a regulatory taking claim against St. Johns based upon the theory that flooding induced by permits St. Johns had issued to FDOT and others had caused Modern's land to be converted from uplands to wetlands, which would result in a denial of development permits by Brevard County, and that this claim was not ripe for adjudication because Modern had failed to apply for a development permit from the county. (Doc. 204 at 2-9). In response, Modern argued that it was not seeking to assert a regulatory taking claim on that basis. (Doc. 247 at 2). The District Court, in denying summary judgment, accepted Modern at its word, stating: "This is a physical takings case, not a regulatory taking case." (Doc. 330 at 7). However, despite clear direction to proceed to trial on a physical taking theory, Modern devoted considerable effort at trial to show that the preceding regulatory denial of the maintenance exemption was the gravamen of Modern's claim against St. Johns. (Transcript: 1170-71; 1542-43).[3]

---

[3] On being pressed by the trial judge about the alleged causes of Modern's flooding, Modern's hydrologist expert, Robert Sprinkle, acknowledged that the bulk of the alleged flooding was

(Continued on following page)

Modern proceeded to trial against St. Johns on a claim of "inverse condemnation by way of flooding." (Opinion at 9). The District Court conducted a three-week bench trial on the issues that had not been resolved by the pretrial motions. (Doc. 401; transcripts). The court made the following relevant findings about the restoration work:

> The subsequent placement of the weirs and filling-in of NS1 merely restored the blockages that existed before the improper dredging. The Plaintiffs presented no evidence to suggest that the weirs or the restored NS1 had elevations higher than those set forth by St. Johns in the Emergency Order or the administrative proceeding.

(Opinion at 28 n.30). "The weirs and the filling-in of 500 feet of NS1 . . . merely reestablished the status quo as it existed before Modern's unpermitted dredging." *Id.* at 24. "Modern's property is wet because it was historically wet and because the 75-year-old system of drainage ditches is no longer viable." *Id.* at 30.

Modern's president admitted that, as of the time of trial, Modern had never applied for a permit to excavate EW1, NS1, or any other drainage ditches near Modern's property. (Transcript: 184-85). St. Johns'

---

due to the occlusions in NS1 and EW1 that Modern had excavated without a permit and been required to restore to the pre-excavation status quo. (Transcript: 1170-71).

director of enforcement confirmed at trial that Modern has always had the ability to apply for a permit to drain its property. (T: 1545).

After reviewing all of the testimony and trial exhibits pertaining to a physical flood taking, the court's ultimate finding of fact was that:

> there is no evidence to suggest that any activities of St. Johns . . . could have caused the property to flood several years [after its purchase]. In short, Modern's claim that the conduct of those Defendants caused his property to flood after 1991 simply does not add up.

(Opinion at 29-30). The District Court entered judgment for St. Johns on Modern's inverse condemnation by flooding claim. *Id.* at 30. It declined to quiet title in Modern's favor as to any kind of drainage easement, and entered judgment for the United States. *Id.*

Modern then filed a motion to alter or amend the judgment, in which Modern again asserted, *inter alia,* its claim against St. Johns based upon the *Modern* decision's denial of the maintenance exemption. (Doc. 466 at 19-22). St. Johns responded that Modern was seeking to assert a regulatory taking claim, and collaterally attacking a final judgment of the Florida courts. (Doc. 471 at 4-5). The District Court agreed and denied the motion, stating:

> Finally, the Plaintiffs' argument that St. Johns caused its property to flood by refusing

> to allow it to excavate canals without a permit runs afoul of its repeated contentions that this is not a regulatory takings case. It also constitutes an improper collateral attack on the decision of the state court, upholding the actions taken by St. Johns.

(Doc. 476 at 4).

Modern has continued to pursue its regulatory taking claim involving denial of the maintenance exemption as the gravamen of its complaint against St. Johns in its appeal before the Eleventh Circuit and in the Petition before this Court.

REASONS FOR DENYING THE PETITION

I. THIS COURT LACKS JURISDICTION BECAUSE MODERN FAILED TO TIMELY APPEAL ITS REGULATORY TAKING CLAIM TO THE FLORIDA SUPREME COURT AND THIS COURT AFTER THE *MODERN* STATE COURT DECISION, AND BECAUSE MODERN'S REGULATORY TAKING CLAIM IS OUTSIDE THE SCOPE OF THE PROCEEDINGS BELOW.

Modern's entire argument on appeal before the Eleventh Circuit and this Court is contrary to the representation Modern made on the record below that it was not asserting a regulatory taking claim. (Doc. 247 at 2). The lower court accepted Modern's contention in denying summary judgment for the District

(Doc. 330 at 7) and adjudicated the case on a physical taking theory, determining *on the facts* that Modern's land had not been physically invaded by any act of the water management district or the other defendants. This factual determination has not been challenged in this appeal. Instead, Modern's entire argument is based upon having been required to obtain a permit before it could drain its land, which, as explained below, is at best an unripe regulatory taking claim because Modern has never sought to obtain any permit. In actuality, Modern is seeking to collaterally attack the earlier ruling of the Florida appellate court in the *Modern* decision, in which it was determined that Modern was required to obtain a permit for the subject activity. The District Court so noted in its order denying Modern's motion to alter or amend the final judgment. (Doc. 476 at 4).

The state court *Modern* decision was entered on March 8, 2001. Modern did not make a further appeal of that decision. Thus, while the gravamen of Modern's appeal herein is a facial challenge to the requirement to obtain a permit before excavating drainage ditches under an "immediate self-help" theory, jurisdiction is lacking because Modern failed to timely appeal the state court *Modern* decision to this Court.

II. INVERSE CONDEMNATION BY FLOODING DOES NOT OCCUR UNDER THE FLORIDA CONSTITUTION WHERE A LANDOWNER PURCHASES FLOODED, WETLAND-CONTAINING PROPERTY, DITCHES AND DRAINS THE LAND, AND, UPON DISCOVERY, IS REQUIRED TO OBTAIN AN AFTER-THE-FACT PERMIT OR RESTORE THE ILLEGAL DREDGING.

A. The Petition Requires Review of Factual Findings and the Application of State Law to the Facts.

Modern's taking claim is brought exclusively under Florida's Constitution. (Doc. 71, ¶¶6, 46, 47). Modern reserved any inverse condemnation by flooding claim it might have under the United States Constitution. (Complaint, ¶44). Accordingly, Modern's flood taking argument is purely one of Florida law.

Under Florida law, "to support a claim for inverse condemnation associated with flooding, the flooding must be an actual, permanent invasion of the land, amounting to an appropriation of, and not merely an injury to, the property." *South Florida Water Management Dist. v. Basore of Florida, Inc.*, 723 So. 2d 287, 288 (Fla. 4th DCA 1998) (internal quotations and citations omitted). Thus, Florida flood-taking law does not conflict with *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) ("*Loretto*").

Under Florida law, an essential element of a flood-taking action is proof that the government

defendant caused the flooding. *Rubano v. Dept. of Transp.*, 656 So. 2d 1264, 1266 (Fla. 1995). Here, the District Court found that the property Modern claims was flooded by St. Johns was in fact already flooded when Modern purchased the property: "Charles Moehle contends that . . . the property was dry when Modern purchased it in 1991 . . . but that contention is **strongly rebutted** by the evidence." (Opinion at 29; emphasis added). The District Court's ultimate finding of fact was:

> there is no evidence to suggest that any activities of St. Johns . . . could have caused the property to flood several years [after its purchase]. In short, Modern's claim that the conduct of those Defendants caused his property to flood after 1991 simply does not add up.

(Opinion at 29-30). Since St. Johns did not cause flooding of Modern's property, the District Court correctly denied Modern's inverse condemnation claim.

Modern has not formally challenged these factual findings in its appeal. Instead, Modern seeks to characterize this appeal as involving a conflict between the District Court's application of Florida takings law to the facts of this case and the United States Constitution, as interpreted by this Court. However, in the absence of a factual finding of a physical invasion, there can be no taking, whether considered under the Florida or United States Constitution. In reality, Modern is complaining about what it believes

are erroneous factual findings by the District Court and misapplication of a rule of state law by the District Court. This Court usually does not review such matters. Supreme Court Rule 10. For this reason alone, the Petition should be denied.

B. *Loretto* and Its Progeny Do Not Conflict With the Decision Below.

Modern acknowledges that in 1972 the Florida Legislature authorized Florida's water management districts, including St. Johns, to require permits for construction and maintenance of drainage ditches and canals. (Petition at 4-5, n.3). Modern purchased flooded property almost 20 years after the permitting requirements came into existence Over 25 years after enactment of these permitting requirements, Modern ditched and drained its wetland-containing property without the necessary permit. Through extensive enforcement proceedings, St. Johns required Modern to either obtain an after-the-fact permit for the illegal ditch dredging or restore what had been illegally dredged. (Pl. Ex. A-281, Ex. A). Modern chose not to apply for an after-the-fact permit. Instead, Modern restored its illegal dredging.

The decision below does not conflict with *Loretto* because the material facts are completely different. "A judicial precedent attaches a specific legal consequence to a detailed set of facts in an adjudged case or judicial decision, which is then considered as furnishing the rule for the determination of a

subsequent case involving identical or similar material facts . . . " *Allegheny City General Hospital v. NLRB*, 608 F.2d 965, 969-70 (3rd Cir. 1979). Had *Loretto* involved the requirement to obtain a permit before removing cables and cable boxes from a building, and had this Court held in *Loretto* that requiring a permit for such removal constituted a physical occupation of property that was a per se taking, then arguably there could be a conflict between the case at bar and *Loretto*. However, *Loretto* had nothing to do with a permitting requirement of this nature.

A taking occurs under *Loretto* "where government *requires* an owner to suffer a *permanent* physical invasion of her property." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538 (2005) (describing *Loretto*) (emphasis added). As this Court said in *Yee v. City of Escondido, Cal.*, 503 U.S. 519, 527 (1992), "The government effects a physical taking only where it *requires* the landowner to submit to the physical occupation of his land. This element of required acquiescence is at the heart of the concept of occupation." (emphasis in original; quotations omitted; *citing*, *F.C.C. v. Florida Power Corp.*, 480 U.S. 245 (1987)).

The instant case is easily distinguishable from *Loretto* and its progeny because St. Johns does not *require* Modern to keep the flooded property Modern purchased in a flooded condition. Although St. Johns requires Modern to obtain a permit before draining the property, the permit requirement is not, under this Court's precedent, a taking:

> A requirement that a person obtain a permit before engaging in a certain use of his or her property does not itself "take" the property in any sense: after all, the very existence of a permit system implies that permission may be granted, leaving the landowner free to use the property as desired.

U.S. v. Riverside Bayview Homes, Inc., 474 U.S. 121, 127 (1985). Since St. Johns does not require or compel a physical occupation or invasion of Modern's property by flooding, there is no taking under *Loretto*.

Moreover, the fact that Modern can obtain a permit to drain its property prevents the flooded condition of the property from being permanent. Permanence of physical occupation is another requirement of a physical taking claim. "Our cases establish that even a minimal 'permanent physical occupation of real property' requires compensation." *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001) (citing *Loretto*). The flooding of Modern's property is not permanent because the duration of the flooded condition is exclusively within Modern's control. The flooding continues only so long as Modern refuses to obtain a permit to drain the property. Once Modern obtains a permit, the physical occupation by floodwaters will cease. Accordingly, Modern's claim that it

is caught in a "catch 22" is disingenuous. (Petition at 33).[4]

---

[4] Modern also attempts to argue that: "[t]he fact that St. Johns' regulatory scheme requires a permit and that such permit might be issued does not obviate, and, therefore, provides no defense to a *Loretto*-type physical invasion taking." (Petition at 20). Modern then asserts its characterization of *some of the evidence* presented at trial regarding this issue. The District Court, however, did not consider Modern's futility assertion to be valid. Modern seeks through this appeal to re-litigate a factual determination that was made by the District Court to reject the "futility" argument. There are many facts below which negate this contention pertaining to Modern's sale of substantial portions of this same property for the development of hotels, a restaurant, and a gas station. (Doc. 450 at notes 39-41 and accompanying text). Obviously, it was not futile for these purchasers to obtain the necessary permits. In addition, the evidence clearly showed that St. Johns did not foreclose the possibility of obtaining a permit, or indicate that a permit would be denied, which is the ordinary basis for a futility argument. *See, e.g., Taylor v. City of Riviera Beach*, 801 So. 2d 259 (Fla. 4th DCA 2001), *rev. denied*, 821 So. 2d 293 (Fla. 2002) (taking claim ripe; futility exception applied where development application under current comprehensive plan denied; not required to seek to amend comprehensive plan). Further, a hypothetical dispute as to the cost of obtaining a permit is not a valid basis for a futility argument. This issue must be vetted in an inverse condemnation proceeding pertaining to the denial of a permit, which is not ripe under Florida law in the absence of at least one meaningful permit application. *See, e.g., Glisson v. Alachua County*, 558 So. 2d 1030, 1036 (Fla. 1st DCA 1990), *rev. denied*, 570 So. 2d 1304 (Fla. 1990), citing, *McDonald, Sommer & Frates*, 106 S.Ct. 2561, 2566 (1986).

Moreover, the futility concept is a regulatory takings concept. As discussed in section I, it does not belong in this physical takings case in any event. Modern cites *Boise Cascade Corp. v. U.S.*, 296 F.3d 1339, 1345-46 (Fed. Cir. 2002) and *Azul Pacifico,*

(Continued on following page)

In sum, St. Johns' permitting requirements do not compel Modern to suffer permanent flooding of its property. Neither the District Court nor the Eleventh Circuit referenced or discussed *Loretto* simply because *Loretto* is not applicable to the facts at bar. The decision below does not conflict with *Loretto*, or any other case. There being no conflict, this Court should not grant the Petition.

Inc. v. City of Los Angeles, 948 F.2d 575, 578 (9th Cir. 1991) in arguing that "when an alleged taking occurs as a result of a physical invasion, the taking is ripe and [the] landowner need not exhaust administrative remedies since the physical invasion is itself final government action." (Petition at 21). Modern ignores that fact that the District Court found after a three week bench trial that there was no physical invasion, and that these findings have not been challenged on appeal. The rent control *regulation* in *Azul Pacifico* that was found to constitute a taking because it granted a *third party* certain rights in the plaintiff's property. Such is not the case here. Modern was simply required to obtain a permit, which it has refused to do. Modern's reliance on *Boise Cascade* is mystifying. That court, citing *Riverside Bayview* and other authorities, held that an agency's imposition of a permit requirement, without more, "simply cannot give rise to a compensable taking." *Id.* at 1350. *Loretto* was discussed and distinguished because the government "compelled landlords to allow cable companies to install boxes on their buildings." *Id.* at 1352. Again, these are not the facts in the instant case. St. Johns has not compelled Modern to accept a physical invasion by a third party, there was no physical invasion, and Modern's inability to drain its land is due solely to its failure to obtain a permit.

C. There Is No Legal Right Under Florida Law to Immediately Abate Flooding.

St. Johns is obligated to address misstatements of law contained in Modern's Petition. Supreme Court Rule 15. Modern inaccurately asserts in a number of places that it has a right under Florida jurisprudence to immediately abate any flooding of its property. This is a glaring misstatement of Florida law.

Modern contends that "the ability of Florida landowners to immediately abate the flooding of their property . . . is legally recognized and protected under the Florida Constitution, Florida Statutes and Florida nuisance and property law." (Petition at 15). The statement lacks any citation to legal authority.

Modern espouses a similar view of the law through the statement, "flooding is recognized under Florida law as both a continuing trespass and nuisance, which under the law of self-help, is immediately abatable . . . " (Petition at 15). This compound sentence is followed by citation to case law, but the cited precedent supports only the part of the compound sentence stating, "flooding is recognized under Florida law as both a continuing trespass and nuisance." Not one of the cited cases supports the part of the sentence claiming that "under the law of self-help [flooding] is immediately abatable."

Elsewhere, the Petition states "St. Johns' regulatory actions have . . . prohibit[ed] Modern from immediately abating the continued physical intrusion and occupation of its property by floodwaters."

(Petition at 18-19). Again, there is no cited authority for the implicit contention that Florida law gives Modern the right to "immediately abat[e] the continued physical intrusion and occupation of its property by floodwaters." Similarly, there is no supporting citation to legal authority for the contention that "Modern has the private proprietary right to immediately rid itself of [floodwaters]." (Petition at 20).

Finally, Modern incorrectly asserts that Florida has followed, at all times relevant to this case, the following English common law principle – "flooding resulting from failure to maintain a drainage ditch constituted an actionable nuisance abatable by immediate self-help." (Petition at 15). Whether flooding constitutes an actionable nuisance is irrelevant to the critical issue in this case of whether St. Johns caused flooding of Modern's property. St. Johns will address Modern's common law argument in the section of this brief refuting Modern's claim of a common law flowage easement.

Moreover, even if there was a right to immediately abate flooding under the law of England, that common law principle has been superseded by Chapter 373 of the Florida Statutes. Section 2.01, Florida Statutes, controls the effect that England's common law has in Florida. That provision provides, in pertinent part:

> The common and statute laws of England . . . down to the 4th day of July, 1776, are declared to be of force in this state; provided,

> the said statutes and common law be not inconsistent with the Constitution and laws of the United States and the acts of the Legislature of this state."

Under that provision, "the common law of England is in effect in Florida except insofar as it is modified or superseded by statute." *Wester v. Rigdon,* 110 So. 2d 470, 472 (Fla. 1st DCA 1959) (citing section 2.01, Fla. Stat.). Whatever the English common law was with respect to the immediate abatement of flooding, any such principle was no longer the law of Florida when Modern ditched and drained its property without a permit in 1997, because the permit requirements adopted in 1972 by Chapter 373, Florida Statutes, superseded the common law by establishing a permitting program. *See Southwest Florida Water Management Dist. v. Charlotte County*, 774 So. 2d 903, 907 (Fla. 2d DCA 2001) (in discussing a groundwater issue, the Court noted that "[p]rior to the Florida Water Resources Act of 1972, which is codified in Chapter 373, Florida Statutes, water rights were governed under Florida common law by the reasonable use rule," citing, *Village of Tequesta v. Jupiter Inlet Corp.*, 371 So. 2d 663 (Fla. 1979)) (footnote omitted). Accordingly, Modern has no legal right under Florida law to immediately abate the flooded condition of its property, even assuming such right did, at one time, exist under English common law.

III. THIS COURT NEED NOT OFFER AN ADVISORY OPINION AS TO THE EFFECT OF *SAN REMO HOTEL, L.P. v. CITY & COUNTY OF SAN FRANCISCO, CALIFORNIA,* ON MODERN'S RESERVED FEDERAL TAKINGS CLAIMS.

Modern's argument under Point II of its Petition presents no grounds for the exercise of the Court's discretionary jurisdiction. The Point posits no argument that the Eleventh Circuit's decision is in conflict with any other court's decision, or that the Eleventh Circuit decided an important question of federal law that has not been, or should be, settled by this Court. *See* Supreme Court Rule 10. Instead, Modern seeks an advisory opinion from this Court on an issue that never factually or legally arose in this case.

In *San Remo Hotel v. City and County of San Francisco*, 545 U.S. 323 (2005), this Court found the Ninth Circuit correctly barred a federal takings claim which had previously been litigated to final judgment in state court. The claim was barred because 28 U.S.C. §1738 mandates that federal courts give preclusive effect to state court judgments, even though the takings claim would not have been ripe for litigation in federal court in the first instance and the plaintiff reserved the federal takings claim in state court.

In the case at bar, the District Court did not bar any claim or issue presented by Modern for which the preclusion holdings of *San Remo Hotel* could be remotely relevant. Consequently, Modern seeks the

Court's exercise of jurisdiction to resolve an issue that is nonexistent and hypothetical. *See North Carolina v. Rice*, 404 U.S. 244, 246 (1971) ("Early in its history, this Court held that it had no power to issue advisory opinions"). Therefore, the petition for a writ of certiorari should be denied.

IV. THE DECISION BELOW PROPERLY REFUSED TO QUIET TITLE IN MODERN'S FAVOR TO A NONEXISTENT FLORIDA COMMON LAW DRAINAGE EASEMENT IN DITCHES ON THE LOWER PROPERTY.

The quiet title action against the United States is set forth in Count IV of the Complaint. (Doc. 71 at 13-14). Modern asked the District Court, in pertinent part, to "[a]djudicate the existence, location, scope and extent of the PLAINTIFFS' drainage easements in the Drainage System."[5] *Id.* at ¶14.b. The court granted judgment for the United States on this count (Opinion at 30), concluding that Modern had no easements, common law or otherwise, in the alleged "drainage system."[6] Modern inaccurately complains

---

[5] The "Drainage System" was described as "an extensive drainage canal system that was dug to serve a large land area east of Titusville along the St. Johns River, including the [Modern] Property (the "Drainage System")." (Complaint, ¶13). Modern alleged that it had "express, implied, and common law drainage easement rights in the Drainage System." (Complaint, ¶17).

[6] In its argument that the decision below constituted a judicial taking, Modern specifically references "its common law

(Continued on following page)

that by refusing to quiet title in its favor to the alleged common law easement, "the existence, location, scope and extent of Modern's common law flowage easement [in the drainage system] was not adjudicated." (Petition at 28).

A. The Issue Involves Only State Law and is Not of Constitutional Dimensions.

By its terms, the federal Quiet Title Act, 28 U.S.C. §2409(a), is a procedural vehicle that allows the United States to be named as a defendant in a civil action to adjudicate a disputed title to real property. The substantive real property issues are governed by state law. *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 378-379 (1977).

Modern's argument suggests only the correction of perceived error relating to interpretation of Florida law regarding the existence of an alleged common law drainage easement in a remnant drainage system. Contrary to Modern's claim, the District Court's conclusion that Modern did not have a common law easement to improve and maintain drainage ditches *on another person's property* does not raise any issue of constitutional dimensions. While this Court could take the time to determine whether Florida law recognizes such a common law easement, that is not

---

flowage easement rights in the drainage canal system." (Petition at 29-30).

the kind of issue this Court ordinarily addresses. *Braxton v. U.S.*, 500 U.S. 344, 347, 111 S.Ct. 1854, 1857 (U.S. 1991) ("A principal purpose for which we use our certiorari jurisdiction ... is to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law"). For this reason alone, the Petition should be denied.

B. Under Florida Law, An Upper Landowner Does Not Enjoy A Common Law Drainage Easement to Improve and Maintain Drainage Ditches Across The Lower Owner's Property.

Modern builds its argument before this Court on the 1884 Blackstone *Commentaries on the Laws of England* ("the *Commentaries*") (Petition at 10-11). At the same time, Modern makes no mention of the dispositive Florida case regarding surface water flowage rights between adjoining landowners, *Gus Machado Buick, Inc. v. Westland Skating Center, Inc.*, 542 So. 2d 959 (Fla. 1989) ("*Westland*"), discussed below. Modern argues from the *Commentaries* for the first time in its appeals before the Eleventh Circuit and this Court, having failed to ask the District Court to take judicial notice thereof, and failed to reference or otherwise discuss the *Commentaries* before the District Court. Modern uses ellipses to juxtapose incomplete quotations from two different chapters of

the *Commentaries* in a way they do not appear in the book.[7] Regardless, the principle Modern relies upon is not relevant to this case and does not reflect Florida law related to surface water drainage, which is set forth in *Westland*.

First, Modern's argument proceeds from a factual premise not present here: "[s]o ***if*** my neighbor ought to scour a ditch, and does not, whereby my lands (sic) is overflowed, this is an actionable nuisance." (Petition, n.7; emphasis added). Thus, if an English landowner's neighbor *assumed an obligation to scour a ditch*, presumably through a contract or other written document, and then failed to honor that obligation, the landowner would then have a nuisance action against the non-performing neighbor. Those are not the facts of the case at bar. This case contains no evidence, much less a factual finding, that any of Modern's neighbors were obligated to keep the drainage ditches clean. Accordingly, the common law principle described by Modern, even if correct, would be factually inapplicable.[8] As Florida's Supreme Court

---

[7] The first sentence of the footnote combines a quotation from a sentence in chapter 13, page 217, with a partial quotation from a sentence in chapter 1, page 5. The second sentence of the footnote contains a partial quotation from a sentence in chapter 1, page 5.

[8] However, as previously discussed, "immediate self-help" is not the law in Florida. Section 2.01, Florida Statutes, adopt the common law of England only to the extent not superseded by the Florida Constitution or statutory law. Chapter 373 is statutory law that superseded any right of immediate self-help, assuming such a right existed under English common law.

has stated, it is "only when the common law is plain that we must observe it." *Duval v. Thomas*, 114 So. 2d 791, 795 (Fla. 1959) ("our own research has not divulged the clear, unambiguous pronouncement of the common law in effect 4 July 1776, that would leave us no room but to adopt it in this case under the mandate of Sec. 2.01 [Florida Statutes]").

In addition, even if the *Commentaries'* "immediate self-help" principle were applied herein, Blackstone states that a nuisance may be abated only so long as the party abating the nuisance "commits no riot in doing it." (*Commentaries* at 5). In this case, the record establishes that hundreds of acres of wetlands, a considerable portion of which were within a national wildlife refuge, were drained as a result of Modern's illegal, unpermitted activity. (Opinion at 7).

Modern's claim of a right to "immediate self help" is also defeated by the factual findings of the District Court that there was no blockage of drainage ditches *within the Refuge* that caused flooding of Modern's land. The NS1 ditch, which the lower court found to be Modern's primary drainage relief (Opinion at 7, 23), is largely located on Modern's land. (Opinion at 6). Modern's land has direct and unimpeded drainage through NS1 to the south and through the Indian River City Canal ("IRCC") to the west.[5] Thus, there is

---

[5] (Opinion, Map at Appendix). Although the IRCC is located within the Refuge, this ditch was improved by Brevard County at Modern's behest without objection from the Refuge and currently provides a positive westerly drainage outfall. *Id.*, *see*

(Continued on following page)

no need for Modern to drain its land through the Refuge. The sole reason for the allegedly un-drained condition of Modern's property is Modern's failure to apply for a permit to drain its land while not causing harm to the Refuge. Development of land in a manner that does not adversely affect adjoining properties is a primary purpose of the water management permitting program Modern has stubbornly disregarded.

Last, but by no means least, there is no nuisance to abate in this case because, as discussed below, a lower landowner has no duty under Florida common law and judicial decisions to maintain a ditch on its property for the benefit of the upper owner. Nor is there is a right under Florida common law or judicial decisions for an upper landowner to enter upon a lower landowner's property to construct or maintain a drainage ditch in the absence of an easement that is lawfully created by a written instrument or prescription. This Court can take judicial notice of the fact that Florida was subject to numerous failed land development schemes in the 1920s time frame (such as the one in this case) involving construction of drainage ditches that have since gone into disrepair. It would wreak havoc if landowners could assert a right to enter upon a neighboring landowner's property, without the owner's permission, to re-dig

---

Brevard County motion for summary judgment, Doc. 182-1, 304; Transcript:1803-06.

drainage ditches that had not been maintained for decades.

Modern advanced a variety of arguments below regarding creation of an easement by a written instrument, implication from a written instrument and implication at law. (*See, e.g.*, Modern's summary judgment motion; Doc. 289). Modern failed to plead creation of a prescriptive easement, and was prevented by the District Court at the pre-trial conference from proceeding to trial on this basis. (Doc. 377 at 39). The District Court, after considering all the evidence, rejected Modern's easement claims, and these rulings have not been challenged in this appeal. Instead, Modern seeks to assert under the common law a right that does not exist in the absence of a validly created easement.

Modern fails to cite *Westland* because Florida's Supreme Court spoke with disfavor about "self-help" drainage remedies. *Westland* adopted the reasonable use rule as described by the court in *Seminole County v. Mertz*, 415 So. 2d 1286 (Fla. 5th DCA 1982), *rev. denied*, 424 So. 2d 763 (Fla. 1982):

> Courts of Florida have applied, in an almost unbroken line of decisions, practically all of the elements of the modified civil law rule of surface water. F. Maloney, S. Plager, R. Ausness, B. Canter, *Florida Water Law* 617 (1980) [hereinafter cited as Maloney & Plager]. The general rule today is that ***the upper owner may improve and enhance*** the natural drainage of ***his land*** so long as

> he acts reasonably and does not divert the flow, and that the lower owner is subject to an easement for such flow as the upper owner is allowed to cast upon him. Maloney & Plager at 592.

Westland, 542 So. 2d at 962, *quoting,* 415 So. 2d at 1289 (emphasis added). Thus, the flowage "easement" discussed in *Westland* requires the lower owner to accept the natural surface flow "cast upon him" by the upper owner, provided the upper owner does not unreasonably increase the lower owner's burden. Under *Westland,* the lower owner must accept this diffused surface flow, *but is not obligated to maintain a ditch on its property to accelerate the flow for the benefit of the upper owner*. Nor is it written anywhere in Florida jurisprudence that the common law allows the upper owner to trespass on the lower owner's land to construct or maintain a drainage ditch. The lower owner's obligation is simply to not obstruct the natural flow of surface waters by building a berm. There was no allegation or evidence herein that USFWS had constructed a berm to block the natural, diffused surface flow from Modern's land.

The *Westland* court viewed the decision before it as involving whether Florida should adopt the "common enemy" rule discussed in *Edason v. Denison*, 142 Fla. 101, 194 So. 342 (Fla. 1940), a case upon which Modern relies (Petition at 12); the strict civil rule law; or a modified civil law rule, which the court referred to as the "reasonable use rule," discussed above. In rejecting the common enemy rule in favor of the

reasonable use rule, the court discussed the potential harm associated with self-help engineering by adjoining landowners: "While the common enemy rule permitted the free improvement of property, it also carried with it the potential burden of self-help engineering contests in which the winner was the person who most effectively turned the excess water upon his neighbor's land." *Westland*, 542 So. 2d at 961. Because the Florida Supreme Court rejected the concept of unreasonable drainage improvements on one's own land, there clearly is no "self-help" easement for drainage improvements on someone else's land, the kind of easement Modern claims here.

Not one of the cases cited by Modern actually supports its argument that Florida recognizes a common law right to go onto a lower owner's property and reconstruct remnant ditches to improve drainage of the upper land. Modern incorrectly asserts that *Lamb v. Dade County*, 159 So. 2d 477 (Fla. 3d DCA 1964) stands for the proposition that the "landowner has [the] right to enter on private property upon which [a] drainage canal is located in order to clean out and maintain [the] canal, and ownership of [the] canal does not vest [the] owner with legal right to obstruct or cutoff flow unreasonably." (Petition at 13, n.9). *Lamb*, however, involved the judicial interpretation of a previously existing easement that had been created by prescription. *Lamb*, 159 So. 2d at 479. There, the underlying fee owner was enjoined from constructing a dam that interfered with the natural flow of the canal, flow to which the upper landowner

was legally entitled through operation of the prescriptive easement. *Id.*

Modern also cites *Stoll v. MacPherson Duck Club, Ltd.*, 607 P.2d 1019 (Colo. Ct. App. 1979), a Colorado lower court decision that involved ditches following the natural drainage and in existence and used for 70 years. (Petition at 14, n.9). No court has ever cited *Stoll* and the case does not reflect Florida law. Moreover, *Stoll* is inapposite to the facts at bar because the remnant ditches herein do not follow any natural watercourse, as they did in *Stoll*. *Id.* at 1021. Here, the predecessor land development company constructed a rectangular grid of ditches across a large, flat, floodplain area, which did not improve upon any natural depressions in the land to increase conveyance capacity. (Opinion at 2-3). In addition, the ditch in *Stoll* was in continuous use since its inception, while the ditches herein fell into great disrepair, not having been maintained since 1958. *Id.* at 29. Finally, *Stoll* did not discuss a legal theory upon which the drainage rights were created. There was no mention of any rights accruing under the common law. The drainage rights may have been created by prescription, or created under an easement implied in law, a type of easement asserted below, fully adjudicated, rejected by the District Court (Doc. 458 at 9-12; Doc. 458 at 13-18), and not at issue in this appeal.

The remainder of the cases Modern cites in Section I.A. of its petition are inverse condemnation cases that involve flooding claims based upon established land rights. They do not bear upon

Modern's assertion that an upper landowner may, without the lower owner's consent, enter the lower owner's property and reconstruct remnant drainage ditches.

V. THERE COULD NOT BE A JUDICIAL TAKING BECAUSE AN UPPER LANDOWNER DOES NOT ENJOY A COMMON LAW DRAINAGE EASEMENT UNDER FLORIDA LAW IN DRAINAGE DITCHES EXISTING ON LOWER PROPERTY, EVEN ASSUMING SUCH A TAKING CLAIM EXISTS AND IT PROPERLY COULD BE BROUGHT HERE FOR THE FIRST TIME IN THIS APPEAL.

For the first time in this case, Modern asserts that the District Court's decision constitutes a "judicial taking" of what Modern characterizes as its "well established common law flowage easement rights." (Petition at 32). This judicial taking claim was not raised below. It is respectfully submitted that it should not be addressed for the first time by this Court. However, were this Court to consider the claim, it would find the claim to be meritless.

As previously discussed, state law determines real property issues. *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 378-379 (1977). If a state's highest court changes its definition of property in a way that causes property owners to be deprived of their previously recognized

"property," then one could make a non-frivolous argument for a judicial taking of that property. That is not what happened in the instant case. Here, a federal judge reviewed the case law cited by the parties, concluded that Florida law did not recognize a common law drainage easement to improve and maintain remnant drainage ditches on another person's property, and declined to quiet title to a non-existent easement.

Significantly, the Petition advances no argument suggesting a source of authority for a federal District Judge to change existing principles of state property law. However, for purposes of argument, St. Johns will assume that a federal District Judge does have such power, and will further assume that this Court would recognize a claim of "judicial taking." Modern's argument nevertheless fails because it is based on the false premise that Florida law, prior to the District Court decision below, recognized a common law right to enter upon someone else's land to re-excavate remnant drainage ditches. As explained in detail in Section IV, a common law easement of that nature has never been recognized under Florida law. Consequently, the prerequisite change to Florida law by the judicial branch of government has not occurred, and there was no judicial taking of a previously existing drainage right. The Petition should therefore be denied.

The Petition mystifyingly claims that the "outcome [of this case] directly conflicts with this Court's decision in *Palazzolo v. Rhode Island*, 533 U.S. 606

(2001)" without explaining the conflict. (Petition at 29). *Palazzolo* has nothing to do with drainage easements under Florida law; nor does it involve a flood-taking claim. This case and *Palazzolo* are not even remotely similar. Therefore, the decision below and *Palazzolo* do not conflict.

CONCLUSION

For the reasons stated above, St. Johns respectfully requests that Modern's Petition for Writ of Certiorari be denied.

Respectfully submitted,

WILLIAM H. CONGDON*
**Counsel of Record*
KATHRYN L. MENNELLA
ST. JOHNS RIVER WATER
MANAGEMENT DISTRICT
4049 Reid Street
Palatka, FL 32177
(386) 329-4314
(386) 329-4485 (Facsimile)
Attorneys for Respondent

143

(3)

Supreme Court, U.S.
FILED
OCT 19 2009
OFFICE OF THE CLERK

No. 09-70

In the Supreme Court of the United States

MODERN, INC., ET AL., PETITIONERS

v.

ST. JOHNS RIVER WATER MANAGEMENT DISTRICT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

ELENA KAGAN
Solicitor General
Counsel of Record
JOHN C. CRUDEN
Acting Assistant Attorney General
JAMES C. KILBOURNE
KATHERINE J. BARTON
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

One of petitioner's five claims is a claim against the United States. That claim seeks to quiet title to alleged drainage easements across the St. Johns National Wildlife Refuge (the Refuge). The district court granted summary judgment to the United States on that claim because it determined that, even though petitioner has a common law easement for the natural flow of water across the Refuge, the United States has not interfered with that easement. The court of appeals affirmed.

The question presented regarding the quiet-title claim is whether the court of appeals erred in affirming the district court's grant of summary judgment to the United States because the district court failed to fully adjudicate the existence, location, and scope of petitioner's common law flowage easement.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 2
Argument 7
Conclusion 13

TABLE OF AUTHORITIES

Cases:

Alderman v. *Murphy*, 486 So. 2d 1334 (Fla. Dist. Ct. App. 1986) 10
Babbitt v. *United Farm Workers Nat'l Union*, 442 U.S. 289 (1979) 11
Block v. *North Dakota*, 461 U.S. 273 (1983) 9
England v. *Louisiana State Bd. of Medical Examiners*, 375 U.S. 411 (1964) 5
Huddleston v. *Dwyer*, 322 U.S. 232 (1944) 8
Jennings v. *Caddo Parish Sch. Bd.*, 531 F.2d 1331 (5th Cir.), cert. denied, 429 U.S. 897 (1976) 5
Schlesinger v. *Councilman*, 420 U.S. 738 (1975) 12
St. Johns River Water Mgmt. Dist. v. *Modern, Inc.*, 784 So. 2d 464 (Fla. Dist. Ct. App. 2001) 4
Stop the Beach Renourishment, Inc. v. *Florida Dep't of Envtl. Prot.*, cert. granted, No. 08-1151 (June 15, 2009) 12
Washington County v. *United States*, 903 F. Supp. 40 (D. Utah 1995) 11
Westland Skating Ctr., Inc. v. *Gus Machado Buick, Inc.*, 542 So. 2d 959 (Fla. 1989) 9, 10

Statute: Page

Quiet Title Act, 28 U.S.C. 2409a 5
28 U.S.C. 2409a(a) 5, 9
28 U.S.C. 2409a(d) 9, 10

In the Supreme Court of the United States

No. 09-70

MODERN, INC., ET AL., PETITIONERS

v.

ST. JOHNS RIVER WATER MANAGEMENT DISTRICT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-2) is not published in the *Federal Reporter* but is reprinted in 308 Fed. Appx. 330. The opinion of the district court (Pet. App. 3-41) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 21, 2009. A petition for rehearing was denied on April 17, 2009 (Pet. App. 141-142). The petition for a writ of certiorari was filed on July 16, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Modern, Inc. (petitioner) is a corporation that owns a parcel of real property in Brevard County, Florida, which it acquired in 1991. Pet. App. 9.[1] That land lies within the floodplain of the St. Johns River. *Id.* at 4-5, 9. Due to natural topography, water on petitioner's property drains through the St. Johns National Wildlife Refuge (the Refuge), which is adjacent to petitioner's property. *Id.* at 5, 224.

The Refuge is owned and managed by the United States Fish and Wildlife Service (the Service). Pet. App. 7. The Service established the Refuge in 1971 to protect the now-extinct dusky seaside sparrow, and it continues to manage the Refuge as a habitat for birds and other wildlife. *Ibid.* The Service seeks to maintain the Refuge as naturally occurring wetlands, which requires allowing the natural flow of water through the Refuge. *Id.* at 7-8.

The remnants of a series of drainage ditches traverse the Refuge and petitioner's property. Pet. App. 7-9. This drainage system was created between 1911 and 1919 by the Titusville Fruit and Farm Lands Company, which originally owned a large tract of land containing both the parcel that later became the Refuge and the parcel that petitioner eventually purchased. *Id.* at 4-5. At the time the Service acquired the Refuge, it appeared that the ditches located on that land had not been maintained for some time. *Id.* at 7-8. The Service did not maintain the ditches after acquiring the land, thereby

---

[1] Another corporation, First Omni Service Corporation (First Omni), owns real property in the same area and originally joined petitioner in this action. Although the petition lists First Omni as a petitioner, Pet. ii, the petition does not present any separate facts or argument regarding First Omni.

allowing for the natural flow of water across the land. *Ibid.*

2. In the late 1980s, the Florida Department of Transportation (FDOT) widened a nearby road. Pet. App. 8. Because that construction project resulted in wetlands loss, FDOT was required to engage in mitigation to offset it. *Ibid.* St. Johns River Water Management District (St. Johns), the state agency responsible for water resource management in the area, issued FDOT a permit for a mitigation project. *Ibid.* The project was carried out by the Service within the Refuge. *Ibid.* The project involved filling in certain drainage ditches on the Refuge to begin trying to restore natural topography, and replacing culverts under Hacienda Road, which traverses the Refuge, with new culverts and riser structures in order to control the flow of water under that road and thereby maintain water levels within the Refuge. *Id.* at 8-9.

Petitioner subsequently claimed to observe increased flooding on its property and complained to St. Johns that alterations in the drainage system were causing the flooding. Pet. App. 10. Following negotiations with petitioner, St. Johns, FDOT, the Service, Brevard County, and others, Brevard County removed obstructions from several ditches, including ditches within the Refuge, and the Service removed all riser boards that had been added to the Hacienda Road culverts. *Ibid.* Apparently unsatisfied with those efforts, petitioner widened and deepened several obstructed drainage ditches, including some located inside the Refuge. *Id.* at 11. Petitioner did not obtain a permit from St. Johns or seek permission from the Service before taking those actions. *Ibid.* As a result of petitioner's actions, the widened ditches began moving "a tremendous volume of water" off peti-

tioner's property, which "lowered water levels across hundreds of acres of open water and wetlands, primarily on the Refuge." *Ibid.*

After noticing the effects that petitioner's unauthorized dredging had on the water level and wildlife of the Refuge, the Service notified St. Johns of that dredging. Pet. App. 11. In response, St. Johns issued an emergency order authorizing the Service to construct earthen weirs at the preexisting elevation of two ditches to counteract the effects of petitioner's excavations. *Id.* at 11-12. St. Johns also filed an administrative complaint against petitioner, alleging that it had improperly excavated portions of the two canals and proposing ways in which petitioner could effectively restore them to their pre-excavation depths. *Id.* at 12.

An administrative law judge (ALJ) upheld both the emergency order and the administrative complaint. Pet. App. 12. In particular, the ALJ determined that petitioner's dredging exceeded the scope of routine custodial maintenance and therefore required a permit. *Ibid.* The ALJ also held that petitioner was required to undertake one of the corrective actions identified by St. Johns. *Id.* at 12-13. St. Johns issued a final order adopting the ALJ's recommendation. *Id.* at 13. Petitioner appealed the final order to the state court of appeals, and the court affirmed that order. See *St. Johns River Water Mgmt. Dist.* v. *Modern, Inc.*, 784 So. 2d 464 (Fla. Dist. Ct. App. 2001).

3. Petitioner then filed suit against St. Johns and FDOT in state court. Pet. App. 13-14.[2] The court deter-

[2] Petitioner had previously filed a similar complaint in state court, but the case had been dismissed because petitioner failed to exhaust its administrative remedies. Pet. App. 13 n.11, 101-102.

mined that the United States was an indispensible party and had to be joined in the action. *Id.* at 14, 102. Once joined, the United States removed the case to federal district court. *Id.* at 14.

Petitioner filed a fourth amended complaint, asserting state-law inverse condemnation claims against St. Johns and FDOT (Counts 1-2)[3]; a claim for declaratory relief against St. Johns and FDOT to establish the existence and location of drainage easements (Count 3); a claim against the United States under the Quiet Title Act (QTA), 28 U.S.C. 2409a, to quiet title to its alleged drainage easements (Count 4)[4]; and a claim against St. Johns and FDOT seeking injunctive relief for trespass (Count 5). Pet. App. 14, 219-228. Petitioner's QTA claim against the United States alleged that petitioner has express, implied, and common law drainage easements on the Refuge. *Id.* at 224. Petitioner sought adjudication of the "existence, location, scope and extent" of those alleged easements and a determination that the

---

[3] Petitioner expressly reserved any federal takings claims against St. Johns and FDOT pursuant to *England* v. *Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964), and *Jennings* v. *Caddo Parish School Board*, 531 F.2d 1331, 1332 (5th Cir.), cert. denied, 429 U.S. 897 (1976). Pet. App. 218-219. Petitioner has not asserted any federal takings claim against the United States. In any event, such a claim would fail because the United States has not interfered with petitioner's claimed property interest (a common law flowage easement). *Id.* at 57-58, 80-81.

[4] Although the complaint named the Service as the defendant in the QTA claim, Pet. App. 224-226, only the United States may properly be named in such an action, see 28 U.S.C. 2409a(a). The Service therefore moved to substitute the United States for the Service as defendant, see 6:03-CV-718 Docket entry No. 380 (M.D. Fla. July 31, 2006), and the district court granted that motion, 6:03-CV-718 Docket entry (M.D. Fla. Aug. 2, 2006).

United States had "interfered with" those easements. *Id.* at 225.

Petitioner filed a motion for summary judgment, seeking a determination that it holds common law flowage easements and express and implied drainage easements running through the Refuge. 6:03-CV-718 Docket entry No. 289 (M.D. Fla. Apr. 12, 2006). The district court denied the motion. Pet. App. 61-96. As relevant here, the court agreed with petitioner that it holds a common law flowage easement, because under Florida law "an upper landowner continues to enjoy an easement across the lower tract for all naturally occurring surface water so long as the land remains in its natural state." *Id.* at 80-81. The court determined, however, that petitioner failed to show that the United States had interfered with the natural flow of water. *Id.* at 81. Indeed, the court explained, "the activities of which [petitioner] complains—principally the filling-in of drainage ditches—would restore the natural flow of surface water, not impede it." *Ibid.* The court further noted that Florida law permits "reasonable use" of surface waters and held that petitioner "has made no showing that the filling in of ditches or other activities that have allegedly led to flooding on [petitioner's] land was an unreasonable use" of the waters on the Refuge. *Ibid.*

The United States filed a motion to dismiss or, in the alternative, for summary judgment. 6:03-CV-718 Docket entry No. 215 (M.D. Fla. Jan. 18, 2006). The district court granted that motion with respect to petitioner's common law flowage easement claim. Pet. App. 42-60. The court again held that, under Florida law, petitioner has a common law flowage easement, but that petitioner failed to show that the United States had "interfere[d] with the *natural* flow of water" and there-

fore had not interfered with petitioner's common law flowage easement. *Id.* at 58. The court denied summary judgment with respect to petitioner's alleged express and implied easement claims. *Id.* at 49-56.

Petitioner filed a motion for rehearing and reconsideration, 6:03-CV-718 Docket entry No. 376 (M.D. Fla. July 31, 2006), which the court denied, *id.* No. 391 (Aug. 16, 2006). As relevant here, the court again rejected petitioner's contention that its common law flowage easement extended to restoration or maintenance of drainage ditches and canals within the Refuge. *Id.* No. 391, at 3-4.

The district court then conducted a three-week bench trial on all outstanding issues. Pet. App. 2, 14. The court concluded, based on all of the evidence at trial, that petitioner did not hold any express or implied drainage easements across the Refuge. *Id.* at 16-25. It also rejected petitioner's remaining claims against FDOT and St. Johns. *Id.* at 25-38.

4. In a brief unpublished, per curiam opinion, the court of appeals affirmed. Pet. App. 1-2. The court concluded that there was no "reversible error in the district court's * * * order, which was entered after a three-week bench trial and which grants final judgment in favor of [the United States, St. Johns, and FDOT]." *Id.* at 2.

ARGUMENT

Petitioner contends (Pet. 28-29) that the court of appeals erred in affirming the district court's grant of summary judgment to the United States on petitioner's Quiet Title Act claim because the district court failed to fully adjudicate the existence, location, and scope of petitioner's common law flowage easement. The court of

appeals' decision is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review therefore is unwarranted.

1. Petitioner's QTA claim does not warrant this Court's review. Petitioner does not contend that the decision below conflicts with any decision of another court of appeals or of this Court with respect to that claim. Instead, petitioner raises a purely fact-bound challenge to the district court's rejection of its QTA claim. That challenge was not expressly addressed in the court of appeals' brief unpublished, per curiam opinion.

Significantly, petitioner does not contend that the courts below erred in holding that the United States did not interfere with petitioner's common law flowage easement. Instead, petitioner faults the district court for not defining its easement with greater specificity. Pet. 28-29. That type of case-specific challenge does not warrant this Court's review. That is especially true where, as here, the district court's decision rested on questions of Florida law regarding the scope of common law flowage easements. See *Huddleston* v. *Dwyer*, 322 U.S. 232, 237 (1944) (this Court typically does not review "the considered determination of questions of state law by the intermediate federal appellate courts").

2. The court of appeals' decision affirming the district court's rejection of petitioner's QTA claim is correct. The district court determined, based on Florida law, that the United States did not interfere with petitioner's common law flowage easement. Pet. App. 58, 80-81. Petitioner does not take issue with that holding.

Pet. 28.[5] Instead, in a one-paragraph argument, petitioner insists that the QTA required the district court to also address what petitioner characterizes as the "entirely separate question" of determining the "existence, location, scope and extent" of its easement. *Ibid.* By not addressing that distinct question, petitioner argues, the court of appeals "fail[ed] to fully adjudicate and effective[ly] reject[ed] * * * [petitioner's] common law flowage easement claim." Pet. 8.

The courts below adjudicated petitioner's QTA claim. The QTA permits the United States to be sued in a civil action "to adjudicate a *disputed title* to real property in which the United States claims an interest." 28 U.S.C. 2409a(a) (emphasis added). A QTA complaint must "set forth with particularity the nature of the right, title, or interest which the plaintiff claims in the real property, the circumstances under which it was acquired, and the right, title, or interest claimed by the United States." 28 U.S.C. 2409a(d). As a waiver of sovereign immunity, the QTA must be strictly construed. See *Block* v. *North Dakota*, 461 U.S. 273, 287 (1983). Thus, to obtain an adjudication of title against the United States under the

---

[5] Although petitioner does not directly challenge the district court's summary judgment ruling on its QTA claim, it suggests that the courts below erred in their application of Florida law regarding flowage easements. See Pet. 10-15. Petitioner is mistaken. As the district court explained, although petitioner has an easement for the natural flow of water across the Refuge, it does not have any right to create or modify artificially created drainage ditches on the Refuge in order to increase drainage from its land. Pet. App. 80-81. Petitioner was required to show that the United States had unreasonably obstructed the natural flow of waters on its land, see, *e.g.*, *Westland Skating Ctr., Inc.* v. *Gus Machado Buick, Inc.*, 542 So. 2d 959, 961-962 (Fla. 1989), and the district court correctly held that petitioner failed to make that showing, see Pet. App. 80-81.

QTA, a plaintiff must identify a "dispute" over title by setting forth the particular property interest it claims to hold as well as the interest claimed by the United States.

Petitioner's complaint identified the disputed property interest as its common law flowage easement, and then alleged that the United States claimed that interest "[b]y virtue of the interference and disregard of [petitioner's] easement interests." Pet. App. 225. The only evidence of "interference and disregard" alleged by petitioner during this litigation was the Service's effort to restore and maintain the natural condition of the Refuge. Petitioner did not articulate "with particularity" any other action of the United States that would implicate a "right, title, or interest." 28 U.S.C. 2409a(d).

The district court fully considered and decided petitioner's claim. The United States did not dispute that, under Florida law, petitioner holds a common law flowage easement. Pet. App. 57, 81. The only question, then, was whether the United States had interfered with that interest. The district court determined that the United States had not interfered with petitioner's flowage easement. *Id.* at 15, 57-58, 80-81. As the court explained (*id.* at 57-58, 80-81), an "upper landowner" like petitioner "enjoys an easement across the lower tract for all *naturally* occurring surface water." *Westland Skating Ctr., Inc.* v. *Gus Machado Buick, Inc.*, 542 So. 2d 959, 963 (Fla. 1989) (emphasis added). The court determined that the activities of the United States did not interfere with that easement because they "restore[d] the natural flow of surface water" rather than "imped[ing] it." Pet. App. 80-81. Moreover, under Florida law, the term "natural flow" excludes man-made drainage ditches. See, *e.g.*, *Alderman* v. *Murphy*, 486

So. 2d 1334, 1337 (Fla. Dist. Ct. App. 1986) ("a ditch is by definition artificial, so that blockage of a ditch would not logically be blockage of a natural water course"). Thus, a common law flowage easement does not create a right to construct or alter drainage ditches on a lower landowner's property (here, the Refuge). See Pet. App. 57-58. The district court correctly relied on those characteristics of the common law flowage easement—along with its separate determinations, unchallenged here, that petitioner holds no express or implied drainage easements—to reject petitioner's QTA claim.

Once the court determined that no interference or disregard by the United States had taken place, there could be no disputed title and thus was no basis for a quiet title action. In particular, there was no basis in the QTA for a court to determine the exact boundaries and conditions of petitioner's common law flowage easement in the absence of "allegations that the United States has interfered with or denied the existence of any rights." *Washington County* v. *United States*, 903 F. Supp. 40, 42 (D. Utah 1995). Indeed, under such circumstances, no case or controversy exists for a federal court to adjudicate. See *Babbitt* v. *United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979) ("basic" case or controversy "inquiry is whether the conflicting contentions of the parties * * * present a real, substantial controversy between parties having adverse legal interests, a dispute definite and concrete, not hypothetical or abstract" (internal quotation marks and citation omitted)). Other than alleged interference with its common law flowage easement, petitioner identifies no outstanding right to be adjudicated under the QTA. There is therefore no basis for this Court's review.

3. Petitioner asks this Court to grant certiorari to determine whether the district court worked a "judicial[] tak[ing]" of its property rights. Pet. 9. Petitioner compares this case to *Stop the Beach Renourishment, Inc.* v. *Florida Dep't of Envtl. Prot.*, cert. granted, No. 08-1151 (June 15, 2009), in which the Court is considering the question whether a Florida Supreme Court decision concerning the littoral property rights of upland owners under the State's common law effected a judicial taking of property requiring compensation under the Just Compensation Clause of the United States Constitution.

This case need not be held pending the Court's decision in *Stop the Beach Renourishment*. The court of appeals did not effect a judicial taking. It did not redefine any of petitioner's property rights under state law. The court's brief, unpublished opinion states that there is no reversible error in the district court's decision and does not opine on state law. Pet. App. 1-2. And the federal district court could not authoritatively redefine Florida's common law; that power lies with the state courts. See, *e.g.*, *Schlesinger* v. *Councilman*, 420 U.S. 738, 755 (1975) (state courts "alone can define and interpret state law"). Further, petitioner's claim is not one for a judicial taking, because the action complained of was not that of a court; the gravamen of petitioner's claim has always been that St. Johns and the FDOT have effected a taking by requiring petitioner to have had a permit for its unauthorized dredging or to take action to reverse the effects of that dredging. That is a conventional takings claim based on legislative and executive action, not a judicial takings claim. Finally, petitioner does not appear to raise any federal question. The only takings claims raised in this litigation were

brought under state law; petitioner expressly reserved any claims under the federal Constitution. See Pet. App. 218-222. Because petitioner's alleged "judicial takings" claim appears to be based on the court of appeals' rejection of his state-law inverse condemnation claims, petitioner does not appear to allege a violation of the federal Constitution. And insofar as petitioner's claim against the United States is concerned, the district court applied settled principles of state law to determine that there was no interference with petitioner's common law flowage easement. See pp. 10-11, *supra*. There was therefore no sudden break from settled law of the type that would be required as a predicate for a judicial taking. The petition therefore should be denied with respect to petitioner's "judicial takings" claim as well.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELENA KAGAN
Solicitor General
JOHN C. CRUDEN
Acting Assistant Attorney General
JAMES C. KILBOURNE
KATHERINE J. BARTON
Attorneys

OCTOBER 2009

145 (4)

No. 09-70

Supreme Court, U.S.
FILED
NOV 11 2009
OFFICE OF THE CLERK

In The

Supreme Court of the United States

MODERN, INC., et al.,

Petitioners,

v.

ST. JOHNS RIVER WATER MANAGEMENT DISTRICT, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY BRIEF IN RESPONSE TO BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

*DAVID SMOLKER
**Counsel of Record*
ETHAN J. LOEB
MATHEW C. LUCAS
BRICKLEMYER SMOLKER & BOLVES, P.A.
500 E. Kennedy Blvd., Suite 200
Tampa, Florida 33602
813-223-3888
Attorneys for Petitioners

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

	Page
REASONS FOR GRANTING PETITION	1
CONCLUSION	8

TABLE OF AUTHORITIES

Page

CASES:

Alaska v. Babbitt, 38 F.3d 1068 (9th Cir. 1994).....2

AT&T Wireless Services of Florida, Inc. v. WCI Communities, Inc., 932 So. 2d 251 (Fla. 4th DCA 2005) 3

Block v. North Dakota, ex rel. Bd. of University and School Lands, 461 U.S. 273 (1983) 2

Cadorette v. U.S., 988 F.2d 215 (1st Cir. 1993).....6

Chicot County v. Sherwood, 148 U.S. 529 (1893).....4

Cohens v. Virginia, 6 Wheat. 264 (1821).....4

Kinscherff v. U.S., 586 F.2d 159 (10th Cir. 1978).....2

Kline v. Burke Construction Co., 260 U.S. 226 (1922).....5

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).....7

Modern, Inc. v. Fla. Dept. of Transp., et al., 381 F.Supp.2d 1331 (M.D. Fla. 2004).....2

New Orleans Pub. Service, Inc. v. Council of City of New Orleans, 491 U.S. 350 (1989).....5

Progressive Consumers Federal Credit Union v. U.S., 79 F.3d 1228 (1st Cir. 1996).....6

Stop the Beach Renourishment, Inc. v. Florida Dept. of Environmental Protection, cert. granted, No. 08-1151 (June 15, 2009) 7, 8

TABLE OF AUTHORITIES – Continued

Page

Ticor Title Ins. Co. v. Brown, 511 U.S. 117 (1994) 7

U.S. v. Gilbert, 244 F.3d 888 (11th Cir. 2003) 5

Willcox v. Consolidated Gas Co., 212 U.S. 19 (1909) 5

STATUTES:

28 U.S.C. § 1449(f) 2

28 U.S.C. § 2409a ..... *passim*

28 U.S.C. § 2410 6

MISCELLANEOUS:

H.R.Rep.No. 92-1559, 92d Cong., 2d Sess. reprinted in (1972) U.S.Code Cong. & Admin.News 4552 2

BLACK'S LAW DICTIONARY p. 1249 (6th ed.1990) 5

REASONS FOR GRANTING PETITION

Several salient facts are apparently undisputed, which, taken together, demonstrate the necessity for this Court's review. From the Brief for the Federal Respondent (Response Brief), the U.S. Fish and Wildlife Service (USFWS), it is undisputed that Petitioner had (at one time, at least) a common law flowage easement so that Modern's property would not flood. Response Brief 10 ("The United States does not dispute that, under Florida law, petitioner holds a common law flowage easement."). There also appears to be no dispute that USFWS was responsible for filling in drainage ditches, changing topography, and altering existing culverts on its Refuge adjoining Modern's property, drainage features that connected directly into the drainage system that had been in place on Modern's property and the Refuge for decades so that Modern's property is now subject to flooding when it was not before. Response Brief 3. In Count 4 of its Fourth Amended Complaint, Modern sought, pursuant to 28 U.S.C. § 2409a (the Quiet Title Act), an adjudication of "the existence, location, scope and extent of [its] drainage easements in the Drainage System" across this Refuge. Pet. App. 225. USFWS concedes that both the district court and the circuit court of appeals below *never described what Modern's flowage easement was*; according to USFWS, such an oversight simply "does not warrant this Court's review." Response Brief 8.

What remains, then, for this Court's consideration is whether the failure of two federal courts to

apply a federal statute to declare the scope of a constitutionally protected property right whose exercise is necessary to abate flooding of Modern's property warrants this Court's intervention. Petitioner respectfully submits it must.

There can be no argument that the Quiet Title Act applies to determine the scope of easements across the United States' property, such as the Refuge. 28 U.S.C. § 2409a(a); *Alaska v. Babbitt*, 38 F.3d 1068, 1074 (9th Cir. 1994); *Kinscherff v. U.S.*, 586 F.2d 159, 161 (10th Cir. 1978) ("The quieting of title where the plaintiff claims an estate less than a fee simple, an easement, or the title to minerals is likewise included in the terms of the proposed statute," *quoting* H.R.Rep.No. 92-1559, 92d Cong., 2d Sess. reprinted in (1972) U.S.Code Cong. & Admin.News 4552). Indeed, as the district court below held,[1] the Quiet Title Act is the exclusive means by which a litigant may challenge the United States' title to real property. *Block v. North Dakota, ex rel. Bd. of University and School Lands*, 461 U.S. 273, 285-286 (1983). And the district court alone had exclusive jurisdiction to render an adjudication concerning Petitioner's easement rights across the Refuge. *See* 28 U.S.C. § 1449(f).

Petitioner was thus left with one, and only one, venue to ever obtain an adjudication of its flowage

---

[1] *See Modern, Inc. v. Fla. Dept. of Transp., et al.*, 381 F.Supp.2d 1331, 1350-1351 (M.D. Fla. 2004).

easement rights in USFWS's Refuge: the district court that accepted the removal of Modern's state court action and refused to remand any part of that action back to the state court. Having accepted jurisdiction of this federal claim, the district court was required to actually quiet the title dispute it had accepted: that is, to identify Modern's flowage easement's scope, where that easement lies, and what Modern could permissibly do with this easement. *See AT&T Wireless Services of Florida, Inc. v. WCI Communities, Inc.*, 932 So. 2d 251, 256 (Fla. 4th DCA 2005) ("The scope of an easement is defined by what is granted, not by what is excluded . . . ") (internal quotations omitted). This was, after all, the issue that Petitioner presented (and tried before the district court) in Count IV of its Fourth Amended Complaint against USFWS.

The district court, however, between its summary judgment order and final judgment, effectively ignored this issue entirely. While recognizing, as it had to, that Modern held something called a common law flowage easement across USFWS's Refuge, the court never answered the fundamental questions: where is that easement located, what is its extent, and what are its limits? Instead, the district court declared that Modern had a flowage easement, but then provided nothing more than the *non sequitur* observation that USFWS and its co-defendants had not "interfered with the natural flow of waters from the Property." Pet. App. 81. Respondent seizes upon this incongruence as well in its Response Brief, when

it contends that, having conceded that Modern holds a flowage easement, the only remaining question was whether it had interfered with that easement. Response Brief 10. Petitioner's constitutionally protected property rights should not have received such short shrift.

It is a fundamental precept of the establishment of the federal judiciary that, when a claim is properly before a federal court, that court has a constitutional duty to actually resolve that claim, the failure of which amounts to a "virtual treason to the Constitution," as this Court has stated:

> Our cases have long supported the proposition that federal courts lack the authority to abstain from the exercise of jurisdiction that has been conferred. For example: "We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the Constitution." *Cohens v. Virginia,* 6 Wheat. 264, 404, 5 L.Ed. 257 (1821). "[T]he courts of the United States are bound to proceed to judgment and to afford redress to suitors before them in every case to which their jurisdiction extends. They cannot abdicate their authority or duty in any case in favor of another jurisdiction." *Chicot County v. Sherwood,* 148 U.S. 529, 534, 13 S.Ct. 695, 697, 37 L.Ed. 546 (1893) (citations omitted). "When a Federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction. . . . The right of

> a party plaintiff to choose a Federal court where there is a choice cannot be properly denied." *Willcox v. Consolidated Gas Co.*, 212 U.S. 19, 40, 29 S.Ct. 192, 195, 53 L.Ed. 382 (1909) (citations omitted). Underlying these assertions is the undisputed constitutional principle that Congress, and not the Judiciary, defines the scope of federal jurisdiction within the constitutionally permissible bounds. *Kline v. Burke Construction Co.*, 260 U.S. 226, 234, 43 S.Ct. 79, 83, 67 L.Ed. 226 (1922).

New Orleans Pub. Service, Inc. v. Council of City of New Orleans, 491 U.S. 350, 358 (1989).

Congress conferred jurisdiction upon the district court to quiet title to the location, scope, extent, and use of Petitioner's flowage easement under the Quiet Title Act. The district court was duty-bound to describe what Petitioner's easement was – that is, to quiet the title dispute before it.

Nor was it sufficient to simply conflate the discrete issues of whether USFWS had *interfered* with Modern's easement rights with the district court's duty to ascertain *what title and rights Modern had* under its easement. To "quiet title" means to positively declare what rights and title a plaintiff has in real property. *See U.S. v. Gilbert*, 244 F.3d 888, 917 n. 72 (11th Cir. 2003) (*quoting* BLACK'S LAW DICTIONARY p. 1249 (6th ed.1990). To then conclude, as the district and circuit court of appeals had, that absent some proven interference, no Quiet Title Act claim exists is

an unheralded departure from both the letter and the spirit of the Quiet Title Act. *Cf. Progressive Consumers Federal Credit Union v. U.S.*, 79 F.3d 1228, 1233 (1st Cir. 1996) (construing 28 U.S.C. § 2410, "[While] [t]raditionally, actions to quiet title have sought determinations of who owns particular property . . . [u]nder federal law, the definition is somewhat broader . . . ") (internal citations omitted); *Cadorette v. U.S.*, 988 F.2d 215, 223 (1st Cir. 1993) ("In an action under the Quiet Title Act, by contrast, a private plaintiff names the United States 'as a party defendant . . . to adjudicate a disputed title to real property in which the United States claims an interest . . . If the plaintiff prevails, he can recover the land wrongly held by the United States. The Quiet Title Act also permits the Government to retain property it does not own, but only *after* a court has reached a 'final determination' in the title dispute 'adverse to the United States.'' ") (internal citations omitted). The district and circuit courts never reached a final determination, but instead essentially "quieted title" by implying what Petitioner's easement was *not* under one set of circumstances;[2] but the courts never stated what or where the easement was. That is a far cry from what the Act requires. It is certainly insufficient given the historic deference to private

[2] At best, the courts' holdings regarding this claim amounted to a finding that, whatever Petitioner's recognized flowage easement was, it was apparently not interfered with.

property rights that federal courts must afford under the constitution.

The failure of the district court and the Eleventh Circuit Court of Appeals to render any determination of the extent of Petitioner's easement rights not only violated a clear mandate of law, it effectively permits a taking of Modern's property in violation of *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). Thus, the need for this Court's involvement becomes all the more clear: Petitioner's due process right to receive an adjudication from the federal district court is paramount in this case because its constitutionally protected property rights are threatened. *See Ticor Title Ins. Co. v. Brown*, 511 U.S. 117, 126 (1994) (*dissent*) ("When a constitutional issue is fairly joined, necessary to the decision, and important enough to warrant review, this Court should not avoid resolving it . . . ").

It remains only to note that the district court's acquisition of jurisdiction over Modern's state law declaratory action regarding its flowage easement, confining that claim within the ambit of the Quiet Title Act, and then passing no judgment whatsoever on what or where that easement is, amounts to just as much a "judicial taking" as this Court is presently considering in *Stop the Beach Renourishment, Inc. v. Florida Dept. of Environmental Protection, cert. granted*, No. 08-1151 (June 15, 2009). An upland owner's common law flowage easement, recognized in name only but eviscerated of dimensions, scope, or rights, is equally as unconstitutional (and troubling)

as a court's redrawing the high water line for landowners' riparian rights. Petitioner respectfully submits that the case *sub judice* would be directly impacted by the guidance this Court may provide in *Stop the Beach Renourishment*. In all respects, this Court's review is both amply justified and necessary.

CONCLUSION

In effect, the Respondent, the district court, and the circuit court in its affirmance, have continued to raise, in new iterations, the still unanswered question that Petitioner had put to the district court in the first place: what could Modern do with its common law flowage easement? Such a basic declaration would certainly have been well within the scope of the Quiet Title Act, the powers of the district court, or the scope of review for the circuit court of appeals. And yet, the questions remain, to this day, unanswered and undeclared. Without this Court's intervention, the "exclusive means" of the Quiet Title Act, through which Modern could obtain an adjudication of the scope of its property rights against the United States – whatever that adjudication might end up being – will be left undeclared, unresolved, and, most critical for purposes of the constitution, unenforceable.

For all of these reasons and the reasons set forth in Modern's Petition, the Court should accept jurisdiction of this case and grant the Petition.

Respectfully submitted,

*DAVID SMOLKER
*Counsel of Record
ETHAN J. LOEB
MATHEW C. LUCAS
BRICKLEMYER SMOLKER & BOLVES, P.A.
500 E. Kennedy Blvd., Suite 200
Tampa, Florida 33602
813-223-3888
Attorneys for Petitioners

November 11, 2009

145

No. 09-70

Supreme Court, U.S.
FILED
NOV 11 2009
OFFICE OF THE CLERK

In The
Supreme Court of the United States

MODERN, INC., et al.,

Petitioners,

v.

ST. JOHNS RIVER WATER MANAGEMENT DISTRICT, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITIONERS' REPLY TO ST. JOHNS RIVER WATER MANAGEMENT DISTRICT'S RESPONSE BRIEF

*DAVID SMOLKER
*Counsel of Record
ETHAN J. LOEB
MATHEW C. LUCAS
BRICKLEMYER SMOLKER & BOLVES, P.A.
500 E. Kennedy Blvd., Suite 200
Tampa, Florida 33602
813-223-3888
Attorneys for Petitioners

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

ST. JOHNS HAS FAILED TO REFUTE MODERN'S REASONS FOR GRANTING PETITION 1

I. Modern's *Loretto*-Type Taking Argument Was Squarely Raised Below 1

II. St. Johns' Jurisdictional Argument Is Contrary To Established Florida Supreme Court Decisions 2

III. The Argument That The Petition Should Be Denied Because Modern's Petition Requires Review Of Factual Findings And Application To State Law Fails 3

IV. The Argument That The District Court's Decision Does Not Conflict With *Loretto* Fails 4

V. The Argument That There Is No Right To Immediately Abate Flooding Under Florida Law Fails 7

VI. Modern's Petition Does Not Seek An Advisory Opinion As To The Effect Of *San Remo Hotel* On Modern's Reserved Federal Takings Claims 8

VII. The Argument That Determination Of The Extent And Scope Of The Common Law Flowage Easement Issue Is Not of Constitutional Dimensions Fails 8

TABLE OF CONTENTS – Continued

Page

VIII. The Argument That An Upper Owner's Common Law Drainage Easement Does Not Encompass The Right To Maintain Existing Drainage Ditches Across A Lower Owner's Property Fails 9

CONCLUSION 12

APPENDICES:

May 17, 2004 Fourth Amended Complaint Excerpts ..... App. 1

November 18, 2003 Response to Defendants, St. Johns River Water Management District and Florida Department of Transportation's Motion to Dismiss Excerpts ..... App. 8

July 27, 2006 Plaintiffs', Modern, Inc. and First Omni Corporation's Amended Answers to St. Johns River Water Management District's Fourth Set of Interrogatories Excerpts ..... App. 14

July 5, 2006 Joint Pre-Trial Statement Excerpts ..... App. 20

August 4, 2006 Trial Brief Excerpts ..... App. 29

July 30, 2007 Plaintiffs' Closing Statement Excerpts ..... App. 39

July 11, 2008 Initial Appellate Brief Excerpts .. App. 51

Survey of the Indian River City Canal ..... App. 60

TABLE OF AUTHORITIES

Page

CASES:

Albrecht v. State, 444 So.2d 8 (Fla. 1984) 3

Associates of Meadow Lake, Inc. v. City of Edgewater, 706 So.2d 50 (Fla. Dist. Ct. App. 5th Dist. 1998) 6, 7

Board of Regents v. Roth, 408 U.S. 564 (1972) 8

Boise Cascade Corp. v. U.S., 296 F.3d 1339 (Fed. Cir. 2002) 5

Brumley v. Dorner, 83 So. 912 (Fla. 1919) 12

Drake v. Walton County, 6 So.3d 717 (Fla. Dist. Ct. App. 1st Dist. 2009) 12

Edason v. Denison, 194 So. 342 (Fla. 1940) 12

Everglades Sugar & Land Co. v. Bryan, 87 So. 68 (1921) 12

Fleming v. State Road Dept., 25 So.2d 376 (Fla. 1946) 12

First English Evangelical Lutheran Church of Glendale v. Los Angeles County, 482 U.S. 304 (1987) 5, 6

Gus Machado Buick, Inc. v. Westland Skating Ctr., Inc., 523 So.2d 959 (Fla. 1989) 10, 11

Hendler v. United States, 952 F.2d 1364 (Fed. Cir. 1991) 5

Keshbro, Inc. v. City of Miami, 805 So.2d 864 (Fla. 2001) 6

TABLE OF AUTHORITIES – Continued

Page

Key Haven Associated Enterprises, Inc. v. Board of Trustees of the Internal Improvement Trust Fund, 427 So.2d 153 (Fla. 1982).....2

Keystone Bituminous Coal Ass'n v. DeBenedictus, 480 U.S. 470 (1987).....9

Libby v. Roberts, 110 So. 82 (Fla. 1959).....12

Lingle v. Chevron, 544 U.S. 528 (2005).....2

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).....*passim*

Pearce v. Pearce, 97 So.2d 329 (Fla. Dist. Ct. App. 2d Dist. 1957).....12

Pennsylvania Coal Company v. Mahon, 260 U.S. 393 (1922).....*passim*

San Remo Hotel, L.P. v. City & County of San Francisco, California, 545 U.S. 323 (2005).....8

Seminole County v. Mertz, 415 So.2d at 1289 (Fla. Dist. Ct. App. 5th Dist. 1964).....12

Skip Kirchdorfer, Inc. v. United States, 6 F.3d 1573 (Fed. Cir. 1993).....5

Tampa-Hillsborough County Expressway Authority v. A.G.W.S. Corp., 640 So.2d 54 (Fla. 1994).....6

U.S. v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985).....4, 5

Yee v. City of Escondido, 503 U.S. 519 (1991).....2

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS:

U.S. Const. amend. V 11

STATUTES:

Federal Quiet Title Act, 28 U.S.C. § 2409a 8

Fla. Stat., Chapter 373 7

Fla. Stat., Chapter 373.171(1) 7

Fla. Stat., Chapter 373.403(8) 7

Fla. Stat., Chapter 373.418(1) 7

Fla. Stat., Chapter 403.813(1) 7

Fla. Stat., Chapter 403.813(2)(f) 7

Fla. Stat., Chapter 403.813(2)(g) 7

Swamp Lands Act of 1850 12

MISCELLANEOUS:

Sup. Ct. R. 10 3

Maloney, Frank E., et al., *Water Law and Administration: The Florida Experience* (1968) 11, 12

ST. JOHNS HAS FAILED TO REFUTE MODERN'S REASONS FOR GRANTING PETITION

I. Modern's *Loretto*-Type Taking Argument Was Squarely Raised Below

St. Johns' argument that this Court lacks jurisdiction over Modern's *Loretto*-type taking claim because Modern represented that it was not asserting a "regulatory" taking is a "strawman" argument. Modern never made such representation, and to suggest otherwise ignores the fact that ***all*** of St. Johns' complained of conduct in this case was "regulatory" in character. The record establishes that: (i) Modern's complaint pled a *Loretto*-type taking; (ii) Modern successfully defeated St. Johns' motion to dismiss based on ripeness citing *Loretto*; and (iii) Modern itemized the various regulatory actions of St. Johns which Modern claimed gave rise to the taking in its responses to pre-trial discovery requests, its pre-trial statement, its trial brief, its closing statement and its initial brief before the Eleventh Circuit. App. 1-59.

The district court's passing characterization of Modern's taking claims as "physical" rather than "regulatory", like St. Johns' argument, is bottomed on a false "physical" versus "regulatory" taking dichotomy. This Court, the Eleventh Circuit and the Florida Supreme Court hold that under *Loretto v. Teleprompter Manhatten CATV Corp.*, 458 U.S. 419 (1982) where government ***by regulation*** compels an owner to suffer the ***physical invasion*** of its property

by a foreign source, a taking results. (Pet. 9, 25-26). The characterization of such takings as "physical" or "regulatory" is not legally meaningful since, such takings are both "physical" ***and*** "regulatory" in character. See, *Lingle v. Chevron*, 544 U.S. 528, 538 (2005). And in any event, this Court traditionally allows petitioners to make new ***argments*** in support of ***claims*** properly presented below even though they were not pressed or passed upon by lower courts. *Yee v. City of Escondido*, 503 U.S. 519 (1991) (where petitioners unquestionably raised a taking claim below they were free to make ***any*** argument in support of that claim before the United States Supreme Court, and were not limited to the precise arguments made below. *Id.* at 535.).

II. St. Johns' Jurisdictional Argument Is Contrary To Established Florida Supreme Court Decisions

St. Johns argues that Modern was required to raise and litigate its taking claim on appeal of St. Johns' final order in the prior state administrative proceeding. This argument has been squarely rejected by the Florida Supreme Court, which holds that a property owner has the "right to bring a separate claim of inverse condemnation in [state trial] court at the conclusion of all judicial as well as executive branch appeals regarding the propriety of the [administrative] action." *Key Haven Associated Enterprises, Inc. v. Board of Trustees of the Internal Improvement*

Trust Fund, 427 So.2d 153, 158 (Fla. 1982); *Albrecht v. State*, 444 So.2d 8, 12-13 (Fla. 1984).

III. The Argument That The Petition Should Be Denied Because Modern's Petition Requires Review Of Factual Findings And Application To State Law Fails

Modern does not seek review of the district court's finding that St. Johns did not cause the flooding that occurred several years after Modern purchased its property. Rather, it seeks review of the district court's conclusion that St. Johns' actions authorizing and requiring the installation of weirs and filling in of the 500-foot section of NS-1 could not be the legal cause of any ***subsequent*** flooding. St. Johns' assertion that the district court failed to find a physical invasion ignores the district court's express factual findings that "the primary cause ***of the flooding*** is the weirs and blockages in NS-1 and EW-1." Pet. App. 38, n.30, 35, 35, n.27.

St. Johns' argument that Modern's petition merely involves misapplication of a properly stated rule of state law also fails. The district court cited no rule of law in support of its legal causation ruling, and the prevailing law, which the district court appears to have overlooked, and which St. Johns does not contest, establishes that interference with the ability to abate flooding is actionable even though the initial obstruction was not chargeable to the defendant. (Pet. 22-24). The district court also failed

to address *Loretto* even though the Florida Supreme Court has adopted it. Thus, Rule 10's admonition is inapplicable where, as here, the district court's state law grounds are unclear, untenable and conflict with the applicable state law that adopts and is so interwoven with federal takings law so as not to be independent thereof.

IV. The Argument That The District Court's Decision Does Not Conflict With *Loretto* Fails

St. Johns' argument that *Loretto* is inapplicable because it did not involve the requirement that the landowner apply for a permit is another "strawman" argument that mischaracterizes Modern's taking claim as one based on the imposition of a permitting requirement. See, *U.S. v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985). The gravamen of Modern's taking claim against St. Johns is not imposition of a permitting requirement. Rather, it is St. Johns' interference with Modern's ability to abate the flooding of its property. This Court's holding in *Loretto* would not have been different had the City's regulations in *Loretto* required Mrs. Loretto to obtain a permit in order to remove the offending cable box. This is because the moving force behind a *Loretto*-type taking is regulatory perpetuation of a physical invasion by a foreign force that the property owner has a right to be rid of. Such a taking is separate, distinct and independent of the argument that imposition of a permitting requirement amounts to a

taking. A similar attempt to conflate these two distinct takings arguments was rejected by the Federal Circuit in *Boise Cascade Corp. v. United States*, 296 F.3d 1339, 1346, n.5 (Fed. Cir. 2002) ("The *Loretto* claim is independent of the regulatory taking claims flowing from the permitting requirement imposed by the district court. It is only claims based on the imposition of the permitting requirement that fall under the rule articulated by the Court in *Riverside Bayview*.").

St. Johns' argument that the instant case is distinguishable from *Loretto* because St. Johns might issue a permit thereby making the physical invasion "temporary" rather than "permanent" is squarely refuted by *Loretto's* progeny. *Skip Kirchdorfer, Inc. v. United States*, 6 F.3d 1573, 1582-83 (Fed. Cir. 1993). ("for a physical invasion to be deemed 'permanent'"), it "need not be continuous and uninterrupted ... [a]n intermittent intrusion still causes a taking," and "[it] does not necessarily mean a taking of unlimited duration."); also see, *Hendler v. United States*, 952 F.2d 1364, 1377 (Fed. Cir. 1991).

St. Johns' argument also ignores: (i) this Court's decision in *First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, 482 U.S. 304 (1987) (recognizing a cause of action for a temporary taking for the period of time a zoning regulation prevented a property owner from having any reasonable use of his property); (ii) Florida Supreme Court decisions recognizing temporary takings as being compensable under the Florida Constitution based on

First English, see, *Tampa-Hillsborough County Expressway Authority v. A.G.W.S. Corp.*, 640 So.2d 54, 58 (Fla. 1994) (temporary deprivation of substantially all economically beneficial or productive use of land may constitute a taking) and *Keshbro, Inc. v. City of Miami*, 801 So.2d 864 (Fla. 2001) (temporary closure of apartments ordered by nuisance abatement board constituted compensable temporary taking); and (iii) the binding Florida intermediate appellate court decision in *Associates of Meadow Lake, Inc. v. City of Edgewater*, 706 So.2d 50 (Fla. Dist. Ct. App. 5th Dist. 1998). In that case, the landowner sought inverse condemnation against the City of Edgewater on grounds that the City's construction of a park without a functioning drainage system flooded his property during the early part of 1991. *Id.* at 50. The City remedied the flooding by late 1991. *Id.* The landowner sought compensation for a "temporary" taking on grounds he was temporarily denied the reasonable use and enjoyment of the flooded property. *Id.* The City argued that the landowner failed to state a cause of action for inverse condemnation because it had not alleged that the flooding caused by the faulty construction was permanent. *Id.* at 51. The trial agreed and entered summary judgment in favor of the City. In reversing the trial court on appeal, the Fifth District Court of Appeal concluded, citing *First English*, that Florida "now recognizes temporary takings as being compensable under its constitution", and held that the trial court erred by "presum[ing] that no taking claim could be brought ... because the condition allegedly caused by the Edgewater had

been remedied." *Id.* at 52. Equally erroneous is St. Johns' presumption that there could be no taking under *Loretto* because a permit might be issued allowing the flooding to be remedied.

V. The Argument That There Is No Right To Immediately Abate Flooding Under Florida Law Fails

St. Johns' assertion that there is no right under Florida law to immediately abate flooding is fallacious because it dismisses Modern's contentions as false without demonstrating them to be so, while ignoring the detailed argument and authorities cited at pages 12-15 of Modern's Petition For Writ of Certiorari. The right inhering in the common law flowage easement under Florida law is at its core the right to immediately abate flooding through drainage canals.

St. Johns' argument that the Florida Legislature extinguished any such rights when it enacted chapter 373, Florida Statutes in 1972 is contrary to the plain language of the following Florida Statute sections: (i) 373.403(8), 403.813(1), 403.813(2)(f) and 403.813(2)(g) (excluding from permitting requirements maintenance of existing drainage canals and ditches); (ii) 373.418(1) (preserving all current exemptions and prohibiting construction of chapter 373 so as to remove or alter these exemptions); and (iii) 373.171(1) (requiring that water management district regulatory action not impair property rights).

VI. Modern's Petition Does Not Seek An Advisory Opinion As To The Effect Of *San Remo Hotel* On Modern's Reserved Federal Takings Claims

St. Johns' argument that Modern seeks an advisory opinion misses the point. Review by this Court would put an end to the taking liability phase of this litigation thereby potentially avoiding the need to ever address *San Remo Hotel, L.P. v. City & County of San Francisco, California*, 545 U.S. 323 (2005).

VII. The Argument That Determination Of The Extent And Scope of The Common Law Flowage Easement Issue Is Not Of Constitutional Dimensions Fails

St. Johns argues that determination of the scope of Modern's common law flowage easement is a matter of state substantive law, and, therefore, is not the kind of issue this court ordinarily addresses. St. Johns' argument is *reductio ad absurdum*. Its acceptance would preclude this Court's review of all lower federal court decisions under the Federal Quiet Title Act since the quieting of proprietary rights necessarily involves the application of existing rules or understanding stemming from state law. *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). Moreover, where, as here, the decision of the federal court of appeals is one to which state laws and decisions are applicable, a conflict with or refusal to follow a decision of the highest state or intermediate appellate court is grounds for this Court's review. In this

case, the Florida Supreme Court and intermediate appellate courts recognize both the continuing validity and scope of the common law flowage easement and the axiomatic rights to maintain easements. The district court's and Court of Appeals' refusal to fully adjudicate the location, scope and extent of Modern's common law flowage easement consistent with Florida law warrants this Court's review.

VIII. The Argument That An Upper Owner's Common Law Drainage Easement Does Not Encompass The Right To Maintain Existing Drainage Ditches Across A Lower Owner's Property Is Unsupportable

St. Johns argues that the English common law right to abate nuisance flooding caused by a neighbor's failure to maintain a drainage canal is dependent upon the neighbor's assumption "of an obligation to scour a ditch, presumably through a written contract or other written obligation." (Resp. Br. 26). St. Johns cites no authority for this proposition, and it is not supported by logic or reason. The common law flowage easement was born of practical necessity to ensure that neighbors did not flood each other. The duty it imposes is not dependent upon contract, rather it is proprietary, derived from the age old common law maxim "*sic utere tuo ut alienum non laedas*" (use your own property in such manner as not to injure that of another). See, *Keystone Bituminous Coal Ass'n v. DeBenedictus*, 480 U.S. 470, 491, n.22 (1987).

St. Johns correctly points out that drainage of Modern's property depends upon use of NS-1 and the IRCC. However, contrary to its further assertion, the IRCC is, in fact, located on the Refuge. App. 60-67.

St. Johns fails to cite any authority for its argument that absent a written instrument or prescription, an upper owner has no right to enter upon the property of the lower owner to maintain a drainage canal. This argument ignores the very nature of easements, which axiomatically include the ancillary rights to enter upon the property of another in order to maintain the easement. The Titusville Fruit and Farmlands developer, in the exercise of its common law flowage easement, constructed the Drainage Canal System to serve nearly 10,000 acres of subdivided lots. Under St. Johns' theory, each time the developer subsequently sold a lot, the common law flowage easement rights inhering in the drainage canal system were extinguished leaving the lot owner without the rights to use and maintain the very drainage canals that the economically beneficial use of his or her lot depended. The law does not countenance such absurd, unreasonable consequences.

St. Johns' reliance upon *Gus Machado Buick, Inc. v. Westland Skating Ctr., Inc.*, 523 So.2d 959 (Fla. 1989) for the proposition that a lower owner is not obligated to maintain a ditch on its property to accelerate the flow for the benefit of the upper owner is misplaced. First, *Westland*, which adopted the "reasonable use" rule, is a tort rule governing disputes between upper and lower owners of ***developed*** lands.

It does not apply to vacant, undeveloped lands in their natural state whose only improvements are several access roads and drainage ditches constructed in the exercise of common law flowage easement rights. *Id.* at 962-63; Frank E. Maloney et al., *Water Law and Administration: The Florida Experience*, 204-05 (1968) (available at http://www.uflib.ufl.edu/ufdc/?b=WL00004983&v=0000). Second, the Court in *Westland* expressly acknowledged that "the principle that an upper owner enjoys ***an easement*** across the lower tract for all naturally occurring water ***continues to apply to land in its natural state***." 523 So.2d at 963.

St. Johns' common law flowage easement theory, if accepted, would transform Florida's common law flowage easement from a right of the upper owner to drain his or her property onto the lower owner's property into a right of the lower owner to flood the upper owner in order to restore and preserve wetlands on the lower owner's property. Such transformation is only constitutionally permissible if accompanied by compensation. See, *Pennsylvania Coal Company v. Mahon*, 260 U.S. 393 (1922) ("When ... [the] seemingly absolute protection [of the Fifth Amendment] is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States." 260 U.S. at 414).

CONCLUSION

Pursuant to the Swamp Lands Act of 1850 the Federal government conveyed to the State of Florida 20.4 million acres of "Swamp and Overflowed" lands – nearly two-thirds of all the land in Florida – for the purpose of facilitating their sale, drainage and development. See, *Everglades Sugar & Land Co. v. Bryan*, 87 So. 68, 73 (1921). Contemporaneously therewith, Florida courts adopted a modified version of the civil rule recognizing a common law flowage easement that includes the upper owner's right "by ditches and drains, to drain land into the natural and usual channels even though the quantity cast upon the lower owner is greatly increased." *Edason v. Denison*, 194 So. 342 (Fla. 1940); Maloney and Plager at 206-07; *Brumley v. Dorner*, 83 So. 912, 914 (Fla. 1919); *Libby v. Roberts*, 110 So. 82 (Fla. 1959); *Pearce v. Pearce*, 97 So.2d 329 (Fla. Dist. Ct. App. 2d Dist. 1957); *Seminole County v. Mertz*, 415 So.2d at 1289, 1286 (Fla. Dist. Ct. App. 5th Dist. 1964). Where, as here, a drainage canal system is constructed in the exercise of these rights, a successor upper owner has a right to rely upon the system, *Drake v. Walton County*, 6 So.3d 717, 720 (Fla. Dist. Ct. App. 1st Dist. 2009), and to maintain not only the portions of the system located on his or her property, but also those located on the lower owner's property, in a condition sufficient to carry off water flowing into it so as not to over-flow the upper owner's land. The rights of maintenance of such easement are ultimately "too elementary to require citation to authorities." *Fleming v. State Road Dept.*, 25 So.2d 376, 379 (Fla. 1946).

Modern has accepted the propriety of St. Johns' interference with its right to abate the flooding of its property, and instead seeks compensation for the continued physical invasion of its property by floodwater that it has the proprietary right to be rid of. Both the district court and the Eleventh Circuit have effectively ignored Modern's claim. In so doing, they overlook this Court's admonition in *Pennsylvania Coal*, that "[w]e are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." 260 U.S. at 414. St. Johns' desire to restore and preserve previously drained wetlands on the St. Johns National Wildlife Refuge does not warrant short-cutting the Florida Constitution by use of its regulatory powers to perpetuate the flooding of Modern's property without payment of compensation. This Court should grant review to remedy the district court's and Eleventh Circuit's failure to enforce *Pennsylvania Coal's* mandate.

Respectfully submitted,

*DAVID SMOLKER
**Counsel of Record*
ETHAN J. LOEB
MATHEW C. LUCAS
BRICKLEMYER SMOLKER & BOLVES, P.A.
500 E. Kennedy Blvd., Suite 200
Tampa, Florida 33602
813-223-3888
Attorneys for Petitioners

November 11, 2009

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

MODERN, INCORPORATED, a Florida Corporation and FIRST OMNI SERVICE CORPORATION, a Florida Corporation,

Plaintiffs,

vs.

STATE OF FLORIDA, DEPARTMENT OF TRANSPORTATION, ST. JOHNS RIVER WATER MANAGEMENT DISTRICT, and UNITED STATES FISH AND WILDLIFE SERVICE,

Defendants.
_____/

Case No.: 6:03-CV-718-ORL-31DAB

FOURTH AMENDED COMPLAINT

(Filed May 17, 2004)

PLAINTIFFS, MODERN, INCORPORATED ("MODERN") and FIRST OMNI SERVICE CORPORATION ("FIRST OMNI"), (collectively the "PLAINTIFFS"), through their undersigned counsel, hereby sue DEFENDANTS, STATE OF FLORIDA, DEPARTMENT OF TRANSPORTATION ("FDOT"), ST. JOHNS RIVER WATER MANAGEMENT DISTRICT ("ST. JOHNS"), and UNITED STATES FISH AND WILDLIFE SERVICE ("USFWS"), and aver:

The Parties

1. MODERN is a Florida corporation whose principal place of business is located in Brevard County, Florida.

* * *

31. FDOT, by its above-described actions, has caused the continuous or frequent physical invasion of PLAINTIFFS' drainage easements and the impoundment of surface waters on the Property so as to flood the Property and so as to raise the groundwater on the Property, the effect of which is to deprive PLAINTIFFS of the economically beneficial use of its Property and its appurtenant drainage easements.

32. ST. JOHNS, by its above-described actions, has authorized the continuous or frequent physical invasion of PLAINTIFFS' easements and the impoundment of surface waters on the Property so as to flood the Property and so as to raise the groundwater on the Property the affect of which is to deprive PLAINTIFFS of the economically beneficial use the Property and appurtenant drainage easements.

The Flooding

33. PLAINTIFFS first began to discover the effects of the FDOT and ST. JOHNS actions in 1995 and 1996. They immediately began efforts to alleviate the problem and prevent future flooding.

34. From 1996 to 1997, PLAINTIFFS attempted to negotiate with ST. JOHNS and FDOT to abate the flooding. ST. JOHNS rejected any possibility of restoring the Drainage System to its pre-filled condition so as to prevent flooding of the Property.

35. In February of 1997, the PLAINTIFFS cleaned out portions of several ditches within the Drainage System bordering the Property in order to relieve the flooding. PLAINTIFFS did so based on the good-faith belief that this activity did not require a permit from St. Johns under chapters 373 or 403, Florida Statutes (2003), because such activity was considered exempt maintenance of an existing drainage ditch.

36. After discovering PLAINTIFFS' maintenance activities, ST. JOHNS, at the request of USFWS, issued an emergency order directing that PLAINTIFFS cease clearing out the drainage ditches (the "Emergency Order") within the Drainage System.

37. The Emergency Order authorized USFWS to place two earthen weirs within portions of the Drainage System that bordered MODERN's property. The weirs were intended to prevent the flow of surface water off of the Property that historically drained from the Property, through the Refuge, and into the St. Johns River.

38. On August 20, 1997, ST. JOHNS filed an Administrative Complaint and proposed order requiring MODERN to undo all ditch maintenance which had [sic] **PLAINTIFFS previously had performed and required MODERN to permanently maintain water levels on the Property that exceed the 100 year flood elevation of the St. Johns River.**

39. The scope and magnitude of the flooding continues to increase and substantial portions of the Property are being converted from dry land to marshy wetlands which did not previously exist.

The Court Action

40. On May 19, 1997, PLAINTIFFS filed a complaint in the Eighteenth Judicial Circuit of the State of Florida in and for Brevard County, Florida, seeking damages for the flooding of the Property, inverse condemnation, and injunctive relief to prevent future flooding of the Property.

41. On January 9, 1998, the Circuit Court entered an order dismissing PLAINTIFFS' complaint and requiring PLAINTIFFS to exhaust their administrative remedies under Chapter 120, Florida Statutes (1998), before proceeding further. The Circuit Court subsequently entered an order holding the Circuit Court case in abeyance until that was accomplished.

42. The PLAINTIFFS have exhausted the administrative remedies as the Circuit Court required.

43. All conditions precedent to maintaining this cause of action has [sic] been met, excused, waived or have otherwise occurred.

England and _Jennings_ Reservation

44. The PLAINTIFFS specifically reserve their claim for inverse condemnation under the United States Constitution pursuant to *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1994); *Fields v. Sarasota-Manatee Airport Authority*, 953 F. 2d 1299 (11th Cir. 1982) and *Jennings v. Caddo Parish School Board*, 531 F. 2d 1331, 1332 (5th Cir. 1976).

COUNT I

INVERSE CONDEMNATION AGAINST ST. JOHNS

45. PLAINTIFFS reallege and incorporate the allegations contained in paragraphs 1 through 44.

46. This is a cause of action for inverse condemnation against ST. JOHNS, and not against FDOT or USFWS, seeking full compensation for the taking of the Property.

47. ST. JOHNS, by its above-described actions, has authorized the continuous or frequent physical invasion of PLAINTIFFS'

easements and the impoundment of surface waters on the Property so as to flood the Property and so as to raise the groundwater on the Property the affect of which is to deprive PLAINTIFFS of the economically beneficial use the Property and appurtenant drainage easements.

48. ST. JOHNS's actions were intended to serve a public purpose.

49. ST. JOHNS has failed and refuses to pay full compensation for the taking resulting from its actions.

* * *

WHEREFORE, the PLAINTIFFS respectfully request this Court grant the following relief:

a. Enjoin ST. JOHNS and FDOT from interfering with PLAINTIFFS' use of the Drainage System to drain the Property;

b. Direct ST. JOHNS and FDOT to restore, or permit others to restore, the Drainage System so as to abate the flooding of the Property;

c. Award in PLAINTIFFS favor its costs of bringing this action; and

d. Such other and further relief as this Court deems just and proper.

DEMAND FOR JURY TRIAL

76. PLAINTIFFS hereby demand trial by jury on all issue so triable.

BRICKLEMYER SMOLKER
& BOLVES, P.A.

By: /s/ Ethan Loeb

David Smolker
Fla. Bar No. 349259
Matthew C. Lucas
Fla. Bar No. 344834
Ethan J. Loeb
Fla. Bar No. 668338
500 East Kennedy Boulevard,
Suite 200
Tampa, Florida 33602
(813) 223-3888
Attorneys for PLAINTIFFS
MODERN, INC. and FIRST
OMNI SERVICE CORP.

* * *

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

MODERN, INC., a Florida Corporation and FIRST OMNI SERVICES CORP., a Florida Corporation

Plaintiffs,

vs.

STATE OF FLORIDA, DEPARTMENT OF TRANSPORTATION, ST. JOHNS RIVER WATER MANAGEMENT DISTRICT, and UNITED STATES FISH AND WILDLIFE SERVICE,

Defendants. /

Case No.: 6:03-CV-718-ORL-31DAB

RESPONSE TO DEFENDANTS, ST. JOHNS RIVER WATER MANAGEMENT DISTRICT AND FLORIDA DEPARTMENT OF TRANSPORTATION'S MOTION TO DISMISS

(Filed Nov. 18, 2003)

Plaintiffs, Modern, Inc. ("Modern") and First Omni Services Corporation ("First Omni") (collectively the "Plaintiffs"), through their undersigned counsel, and pursuant to Middle District of Florida Local Rule 3.01(b) (2002), hereby collectively responds to the Motions to Dismiss filed by Defendants, St. Johns River Water Management District ("St. Johns") (Dkt. 47, 50) and the Florida Department of

Transportation ("FDOT") (Dkt. 51-52) (collectively the "Defendants"). In support hereof, the Plaintiffs show the following:

1. **Factual and Procedural History.**

This case arises from the Plaintiffs' maintenance dredging of a canal system that has historically drained their properties, both of which are located within the St. Johns River basin

* * *

d. Ripeness.

Based upon nothing more than a purported failure to apply for a permit, St. Johns argues that the Plaintiffs' claim for inverse condemnation is not yet ripe for judicial review. This assertion ignores the very essence of the Plaintiffs' takings claims. The Plaintiffs are not seeking relief for denial of a regulatory permit. They are seeking relief for the physical invasion of their property interests through government actions that authorized or resulted in ongoing physical invasion of Plaintiffs' property interests.

Once a physical invasion occurs, as has been alleged, a landowner is not required to "ripen" its taking claim through further administrative process before suing in court.

As the U.S. District Court for the Northern District of Texas stated:

> ***Where there has been a physical invasion, the taking occurs at once***, **and nothing the city can do or say after that point will change that fact.** ***Hall v. City of Santa Barbara*****, 833 F.2d 1270, 1281 n. 28 (9th Cir. 1986),** ***overruled on other grounds*** **by** ***Yee v. City of Escondido*****, 503 U.S. 519, 112 S.Ct. 1522, 118 L.Ed.2d 153 (1992). The alleged flooding of surface water onto [plaintiff's] land, the extension of the drainage pipe beyond [the defendant's] easement, and the damage to her house, land, swimming pool, trees, shrubbery, and ground cover all constitute a physical invasion of her property. As a result, a taking has been alleged, satisfying the first prong of the** ***Williamson County*** **ripeness test.**[8]

Milliken v. Town of Addison**, 2002 WL 31059802, * 2 (N.D. Tex. 2002) (emphasis added),** ***see also Loretto v. Teleprompter Manhattan CATV Corp.*****, 458 U.S. 419, 426 (1982) ("Our cases further establish that when the physical intrusion reaches the extreme form of a permanent physical occupation, a taking has occurred. In such a case, the character of the government action not only is an important factor in resolving whether the action works a taking but also is**

---

[8] The second "prong" under *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 195 (1985) is that just compensation was not paid.

determinative") (internal quotations omitted).[9] In all events, then, the claims for inverse condemnation are ripe for review.

5. <u>Count V – the Equal Protection Claim – is Far Beyond the Purview of an Administrative Hearing; In all Respects, Count V States a Cause of Action.</u>

Applying *Key Haven,* Defendants assert that the Plaintiffs were required to raise any equal protection challenge before the district court of appeal. They are correct. *Key Haven* requires that a party raise and adjudicate any equal protection and substantive due process claims arising under state law from the administrative proceeding in the district court of appeal. However, a plaintiff may always reserve their federal constitutional claims resulting from agency action for adjudication before a federal district court. *See England,* 375 U.S. 411; *Fields,* 953 F.2d 1299; *Jennings,* 531 F.2d 1331. As the attached Exhibit "F" reveals, the Plaintiffs made their *Jennings-England* reservation. The Defendants nonetheless argue that the federal equal protection claims fail to state a cause of action, and are barred by *res judicata* and collateral estoppel.

i. Failure to State a Cause of Action.

The Defendants assert that Plaintiffs "fail[ ] to allege intentional discrimination against plaintiffs." (Dkt. 50 at p. 25). St. Johns's only argument in this regard is that Plaintiffs did not specifically allege a "purposeful" intent to discriminate against them as

required under *Snowden v. Hughes*, 321 U.S. 1 (1944) and *GJR Investments Incorporated v. County of Escambia, Florida*, 132 F.3d 1359 (11th Cir. 1998). Although the word "purposeful" is not used in the Third Amended Complaint, there are more than ample allegations from which it can be inferred.

> 109. St. Johns's application of rules, policies, and actions related to the Plaintiffs' property is unfairly discriminatory when compared to the treatment that St. Johns accorded similarly situated property owners, including but not limited to:
>
> * * *

WHEREFORE, the Plaintiffs respectfully request this Court to deny the Defendants' Motions to Dismiss, or in the alternative Motions for Summary Judgment in total.

BRICKLEMYER SMOLKER
& BOLVES, P.A.

By: /s/ [Illegible]

David Smolker [FBN 174520]
Fla. Bar No. 349259
Matthew C. Lucas
Fla. Bar No. 344834
500 East Kennedy Boulevard,
Suite 200
Tampa, Florida 33602
(813) 223-3888
(813) 228-6422
Attorneys for PLAINTIFFS
MODERN, INC. and FIRST
OMNI SERVICE CORP.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was forwarded by United States mail this 17th day of November, 2003 to William H. Congdon, Esquire, Attorney for ST. JOHNS, Post Office Box 1429, Palatka, Florida 32178-1429; Walter Kelly, Esquire, Florida Department of Transportation, 605 Suwannee Street, Tallahassee, Fl 32399-0458; Samuel D. Armstrong, Assistant United States Attorney, 201 Federal Building, 80 North Hughey Avenue, Orlando, Florida 32801.

By: /s/ [Illegible]
David Smolker

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

MODERN, INC., a Florida Corporation and FIRST OMNI SERVICES CORP., a Florida Corporation

Plaintiffs

v.

STATE OF FLORIDA, DEPARTMENT OF TRANSPORTATION, ST. JOHNS RIVER WATER MANAGEMENT DISTRICT, and UNITED STATES FISH AND WILDLIFE SERVICE,

Defendants.
_____/

Case No.: 6:03-CV-718-ORL-31DAB

PLAINTIFFS', MODERN, INC, AND FIRST OMNI SERVICE CORPORATION'S AMENDED ANSWERS TO ST. JOHNS RIVER WATER MANAGEMENT DISTRICT'S FOURTH SET OF INTERROGATORIES

(Filed Jul. 27, 2006)

Plaintiffs, Modern, Incorporated and First Omni Service Corporation (collectively "Plaintiffs"), through their undersigned counsel, hereby amend their responses to St. Johns River Water Management District's ("St. Johns") Fourth Set of Interrogatories.

PRELIMINARY STATEMENT AND GENERAL OBJECTIONS

Plaintiffs' answers to St. Johns's interrogatories are limited to the extent said interrogatories exceed the permissible scope of discovery or seek information that is neither relevant to the subject matter of this action or reasonably calculated to lead to the discovery of admissible evidence. Plaintiffs' answers to St. Johns's interrogatories are further limited to the extent said interrogatories seek to assume the truth of matters not established, or seek privileged information, proprietary information, confidential trade information, marketing information, or

* * *

1. For each permit issued by the District that you contend caused or contributed to flooding of the property that is the subject of this litigation, please:

(a) State permit number, permittee, and date of permit issuance.

(b) Describe as specifically as possible any statutory or rule provisions that you contend were not met.

(c) State each and every fact that supports your contention that the statutory (sic) or rule provisions were not met.

ANSWER:

(a) This interrogatory seeks information related only to permit issuance; however, the Plaintiffs, out of abundance of caution, provide the following supplemental information supporting its case against the St. Johns River Water Management District. Plaintiffs contend that under the Federal Rules of Civil Procedure, they have more than adequately revealed the acts that St. Johns has taken that have cause [sic] or contributed to the flooding of the Properties. This supplemental information is based on discovery, numerous depositions, and review of thousands of documents produced by the parties, which have revealed the full scope of the actions that constitute the claims against St. Johns.

Permit Number	Permittee	Date of Permit Issuance
4-009-0585AG-ERP	Brevard County	February 10, 1998
12-009-0080	Great Outdoors	November 13, 1990
1997 Emergency Order issued to USFWS	**USFWS**	**1997**

1997 Administrative Order from St. Johns River Water Management District and Administrative Complaint requiring Modern to fill NS-1 ditch and/or canal	N/A	1997
Hacienda Road 4-009-02986	FDOT	September 14, 1988
Exemption for Culvert in IRCC per John Juliana	Brevard County	September 25, 1996 October 9, 1996
4-009-0278	J. Eckerd	January 12, 1988
St. Johns's implementation of it nonstructural flood control program	N/A	1970's to present
St. Johns's Acquiescence in the United States Fish and Wildlife Service's filling in and plugging of ditches within the St. Johns	N/A	1970's to present

National Wildlife Refuge without requiring permits or without instituting an action to require them to restore the said ditches		
St. Johns's Establishment and implementation of the non-rule policy regarding exempt maintenance	N/A	Hal Wilkening Memorandum
St. Johns's seeking grossly excessive penalties and fines against Modern	N/A	2001
St. Johns's failure to require FDOT to maintain the failed State Road 50 underdrain system and adjacent ditches	N/A	Ongoing
St. Johns's failure to require FDOT to correct the failed State Road 50 underdrain system	N/A	Ongoing

St. Johns's collaborative effort with other environmental agencies to restore the marshes along the St. Johns's River.	N/A	Ongoing
St. Johns's promulgation and application of rules regarding exempt maintenance		

* * *

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

MODERN INC. and FIRST OMNI SERVICES CORP., both Florida corporations,

Plaintiffs,

v.

STATE OF FLORIDA, DEPARTMENT OF TRANSPORTATION, St. Johns RIVER WATER MANAGEMENT DISTRICT and UNITED STATES FISH AND WILDLIFE SERVICE,

Defendants.

CASE NO. 6:03-cv-718-Orl-31DAB

St. Johns RIVER WATER MANAGEMENT DISTRICT,

Third-Party Plaintiff,

v.

BREVARD COUNTY; THE GREAT OUTDOORS R.V./GOLF RESORT; AND ESTATE OF JACK ECKERD,

Third-Party Defendants. /

JOINT PRE-TRIAL STATEMENT

(Filed Jul. 5, 2006)

1. BASIS OF FEDERAL JURISDICTION

The basis of federal jurisdiction in this case is the quiet title claim against the United States of America, which was brought pursuant to 28 U.S.C. 2409a. The Court has supplemental jurisdiction over the state-law claims against St. Johns and FDOT pursuant to 28 U.S.C § 1367.

* * *

Emergency Order; and (iv) corrective actions required of plaintiff Modern by a St. Johns final order. A state appellate court affirmed the Emergency Order and the corrective action final order.

Plaintiffs Fourth Amended Complaint makes inverse condemnation claims against St. Johns (Count I) and FDOT (Count II), requests a declaratory judgment as to Plaintiffs' alleged drainage easement rights within the Refuge (Count III), seeks to quiet title under federal law against Fish and Wildlife as to Plaintiffs' alleged drainage easement rights within the Refuge (Count IV), and finally, in the alternative, demands permanent injunctive relief to prevent St. Johns and FDOT from interfering with the operation of the alleged drainage ditch system and requiring them to restore or permit others to restore the alleged drainage system so as to abate the alleged flooding of the Property (Count V)

3. STATEMENT OF EACH PARTY'S CASE

a. Plaintiffs' Statement of Case:

Modern and First Omni own property located at or near the interchange of I-95 and SR 50 in Brevard County, Florida contiguous with the City of Titusville to the east. Their properties are served by an extensive system of intersecting east-west and north-south drainage canals (the Drainage Canal System") that was constructed in the early 1900s to drain the 12,800 acre Titusville Fruit and Farm Lands Sub-division, which was platted in 1914. Portions of the Drainage Canal System collect and channel large amounts of upstream surface water drainage from the City of Titusville to the east, and disposes of the waters to the west through several east-west canals onto marshes on the Refuge and to the south through several north-south canals that discharge into the Addison Canal which in turn discharges west to the St. Johns River. These drainage canals also serve and are near, adjacent to or within Modern's and First Omni's properties. Reasonable improvement and enjoyment of their properties requires that Modern and First Omni drain the surface waters that naturally and artificially collect on the properties and within the canals adjacent to or on their properties as a result of regularly recurring rainfall and the upstream Drainage Canal System. Plaintiffs have the right under Florida law to dispose of these surface waters and to channelize and enhance the drainage of their properties in order to improve and enjoy them. These rights include the rights to maintain the canals

or ditches and to remove any obstructions, whether man-made or naturally occurring, within those portions of the Drainage Canal System reasonably necessary to adequately drain and prevent flooding of their properties by both natural and artificial drainage. If the obstructions to this portion of the Drainage Canal System are not removed and the canals not maintained, the natural and artificial drainage impounds within and overflows the canals, thereby raising water table elevations and flooding or increasing the frequency, magnitude and duration of flooding of all or portions of Modern's and First Omni's properties such that they remain flooded for prolonged periods of time especially during the wet season.

Plaintiffs contends [sic] that FDOT, **St. Johns and** USFWS, by their various activities and conduct, in whole or in part, have: **(i) caused and continue to cause and perpetuate flooding of Plaintiffs' properties that results from increased groundwater elevations and frequent and prolonged inundation from rainfall and (ii) have increased the magnitude, frequency and duration of such flooding. Plaintiffs further contend that these conditions are will** [sic] **continually reoccur in the future so as to permanently appropriate all or portions of Plaintiffs' properties.**

Discovery in this case reveals that the full scope of Defendants' conduct and activities effusing and or contributing to flooding of the Property includes: (i) implementation and enforcement by USFWS and St. Johns and facilitation by

FDOT of official policies and practices of eliminating existing Drainage Canal Systems that drain the floodplain of the St. Johns River by plugging and filling them in or authorizing or acquiescing in such plugging and filling-in, all in order restore the natural drainage pattern to the previously drained marshes and to restore their water levels and allow them to flood; (ii) FDOT's design, engineering, permitting, construction and maintenance of I-95 and SR 50, implementation of the Hacienda Road mitigation plan, its design of and failure to maintain or remedy the dysfunctional SR 50 underdrain system, and its filling in as part of the widening of SR 50 of "Various connections between the IRCC and several of the north-south ditches; (iii) **St. Johns'** issuance of permits for SR 50 widening, for the Hacienda Road mitigation plan and for other drainage works in the area, its **issuance of the Emergency Order and Administrative Complaint and Order having the effect of preventing Plaintiffs from cleaning out and removing the obstructions within the EW-1 and NS-1 drainage canals that are causing and or contributing to the flooding of Plaintiffs' properties, its implementation and enforcement of non-rule policy and its subsequent adoption of formal rules having the effect of extinguishing Plaintiffs' common law and statutory rights of exempt canal or ditch maintenance to original design specifications thereby, as a practical matter, effectively preventing Plaintiffs from maintaining the portions of the Drainage Canal System, including NS-1 and**

EW-1 and EW-1½ necessary to abate the flooding of their properties, its seeking of fines and penalties against Modern that are draconian and wholly out of proportion to the severity of the consequences of Modern's excavation of NS-1 and EW-1 canals in order to punish Modern and discourage Plaintiffs from exercising their rights to drain their properties under the law even though Modern has fully complied with the terms of the Administrative Complaint and Order by restoring EW-1 and NS-1 to its alleged pre-excavation condition., and its failure to require that the dysfunctional underdrain system of SR 50 be corrected by FDOT.

Plaintiffs contend that the flooding constitutes an enjoinable trespass and rises to the level of taking requiring compensation pursuant to Article 10, section 6 of the Florida Constitution. Plaintiff [sic] further contends that their properties enjoy appurtenant drainage rights in the portions of the Drainage Canal System on, adjacent to and in the vicinity of their properties necessary to adequately drain their properties, including, but not necessarily limited to canals known as EW-1, EW-1½, NS-1, NS-2 and the Indian River City Canal ("IRCC"). These drainage rights include: (1) public drainage easements by common law dedication; (2) private implied easements by plat; (3) private express easements by plat; (4) private express easements by deed; (5) private implied easement by virtue of the so-called "SunCharm Transaction"; and **(6) private common law flowage easements. Plaintiffs contend that**

FDOT and St. Johns, by their activities and conduct, have in whole or in part, permanently interfered and by so doing have taken these rights.

Plaintiffs further contend that with regard to Defendants remaining affirmative defenses that:

(i) issuance of permits to facilitate drainage of Plaintiffs' properties is not a defense to a flooding claim that involves a physical invasion or governmental actions that cause, contribute to, authorize, perpetuate or prevent the abatement of a physical invasion;

(ii) the Reasonable Use Rule does not apply because (a) St. Johns has no standing to raise the defense and (b) even if it did, the rule does not permit the USFWS and FDOT to

* * *

b. For Defendants: At this time, Defendants do not anticipate offering any depositions into evidence

15. MOTION OR OTHER MATTERS THAT REQUIRE ACTION BY THE COURT

a. St. Johns River Water Management District's Motion for Summary Judgment.

b. St. Johns River Water Management District's *Daubert* Motion.

c. Florida Department of Transportation's *Daubert* Motion.

d. United States Fish and Wildlife Service's Motion for Summary Judgment.

e. Any motions that the parties will file on July 10, 2006.

16. MONEY DAMAGES

Because this case has been bifurcated, Plaintiffs will not be presenting proof to of money damages. If they prevail on the liability phase of this cause, then they will present evidence of damages at the second phase of this case.

BRICKLEMYER SMOLKER & BOLVES, P.A.

By: /s Ethan J. Loeb
David Smolker, Esq.
Fla. Bar No. 349259
Ethan J. Loeb, Esq.
Fla. Bar No. 668338
500 East Kennedy Boulevard, Suite 200
Tampa, Florida 33602
(813) 223-3888
(813) 228-6422 (fax)
Attorneys for Plaintiffs Modern, Inc. and First Omni Service Corp.

STATE OF FLORIDA, DEPARTMENT OF TRANSPORTATION

By: /s Walter Kelly
Walter Kelly. Esq.
Florida Bar No. 0181697
605 Suwannee Street
MS 58
Tallahassee, Florida 32399-0458
(850) 414-5290
(850) 488-5264 (fax)
Attorneys For State of Florida Department of Transportation

ST. JOHNS RIVER WATER MANAGEMENT DISTRICT

By: /s William H. Congdon
William H. Congdon, Esq.
Florida Bar No.: 0283606
Stanley J. Niego, Esq.
Florida Bar No.: 0193830
4049 Reid Street
Palatka, Florida 32177
(386) 329-4314
(386) 329-4485 (fax)
Attorneys for St. Johns River Water Management District

UNITED STATES FISH AND WILDLIFE SERVICE

By: /s Samuel D. Armstrong
Samuel D. Armstrong, Esq.
Florida Bar No.: 363626
501 W. Church Street
Suite 300
Orlando, Florida 32805
(407) 648-7500
(407) 648-7588 (fax)
Attorneys for United States Fish and Wildlife Service

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

MODERN, INCORPORATED, a Florida Corporation and FIRST OMNI SERVICE CORPORATION, a Florida Corporation,

Plaintiffs,

vs.

STATE OF FLORIDA, DEPARTMENT OF TRANSPORTATION, ST. JOHNS RIVER WATER MANAGEMENT DISTRICT, and UNITED STATES FISH AND WILDLIFE SERVICE,

Defendants.

Case No.: 6:03-CV-718-ORL-31DAB

ST. JOHNS RIVER WATER MANAGEMENT DISTRICT,

Third Party Plaintiff,

vs.

THE GREAT OUTDOORS PREMIER R.V./GOLF RESORT, INC. and BREVARD COUNTY,

Third Party Defendants. /

TRIAL BRIEF

(Filed Aug. 4, 2006)

Plaintiffs, Modern, Incorporated ("Modern") and First Omni Service Corporation ("First Omni") through their undersigned attorneys, submit their Trial Brief.

I. FACTS.

Modern and First Omni own property located at or near the interchange of Interstate 95 ("I-95") and State Road 50 ("SR 50") in Brevard County, Florida at the western edge of the City

* * *

656-657 (Fla. 2d DCA 1958); Bruce & Ely, *supra* at ch. 4, § 4.03[2]. A claimant must also show that the claimed easement was continuous, apparent, and necessary at the time there was unity of title. *Kirma*, 102 So. 2d at 657. An implied easement is continuous if it is apparent. *Id*. An implied easement is apparent if it is visible or might be visible through reasonable inspection. *Id*. If continuous and apparent, the claimant must finally show that the specific right was necessary for the complete enjoyment of the estate granted or reserved once severed. *Id*. At the time of the Sun Charm transaction, the drainage ditches existed through the lots that were conveyed and the lots that were reserved. There was severance. The ability to use the drainage ditches between the lands that were conveyed and the lands that were reserved

was necessary to enjoy the conveyed parcels. Likewise, the reserved parcels needed the drainage ditches to the west, which were located on the conveyed parcels, to keep lands dry. The drainage ditches were apparent to the public, and obviously to the grantors and grantees.

(2) Taking

Flooding of private property caused by government conduct or activities is the quintessential *per se* physical invasion taking. *Pumpelly v. Greenbay*, 13 Wall (80 US) 166, 181 (1871) (invasion of real estate by superinduced additions of water or by having artificial structure placed on it so as to effectually destroy or impair its usefulness is a taking within the meaning of the U.S. Constitution).[4] For flooding

---

[4] ***See also Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 427-428 (1982) (discussing U.S. Supreme Court treatment of flooding and other physical invasion taking cases, stating that these cases emphasize that physical invasion cases are special and have not repudiated the rule that any permanent physical occupation is a taking, and concluding that where the "character of the governmental action . . . is a permanent physical occupation of property, our cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner"); *Storer Cable T.V. of Florida v. Summerwinds Apartments Associates, LTD*, 493 So. 2d 417 (Fla. 1986) (statute allowing tenants to have cable television**

(Continued on following page)

resulting from government conduct or activity to rise to the level of a compensable taking, it must constitute an actual, permanent physical invasion of land amounting to an appropriation, rather than mere injury to property. *Kendry v. State Road Dept.*, 213 So. 2d 23 (Fla. 4th DCA 1986). According to the Fifth District Court of Appeal in *Associates of Meadow Lake, Inc. v. City of Edgewater*:

> [t]here is no absolute rule regarding the magnitude or duration of flooding necessary to constitute a taking. It is generally recognized that a single flood of short duration or occasional temporary flowage, is not sufficient to constitute a taking. Conversely, substantial periodic flooding, coupled with a likelihood of recurrence, has been held to constitute a taking . . . Most formulations of the rule speak of *permanent* invasions, even though "predictable periodicity" appears to be an acceptable substitute for "permanency."

706 So. 2d at 51 (quoting with approval § 606[2][c], *Nichols on Eminent Domain*).

Flooding is considered permanent if the rainfall conditions causing it are reasonably expected to continually recur in the future. *Kendry*, 213 So. 2d at 27; *Elliott v. Hernando County*, 281 So. 2d 395 (Fla. 2d DCA 1973); *Hillsborough County v. Gutierrez*, 433 So. 2d 1337 (Fla. 2d DCA 1983). A wide variety of

---

within their homes at landlord's behest constituted a taking).

governmental conduct and actions resulting in permanent flooding have been held to by Florida courts to constitute a taking.[5] Under Florida law, where the conduct of two or more entities combines to cause flooding, they are held to be jointly and severally liable for the total injury regardless of the extent of each individual's contribution to the flooding, and even if none of the government's actions, considered individually, unconstitutionally infringed on property rights. *Anhoco Corp. v. Dade County*, 144 So. 2d 793, 796 (Fla. 1962); *Lost Tree Village Corp. v. City of Vero Beach*, 838 So. 2d 561, 568-69 (Fla. 4th DCA 2002). In

---

[5] *See State Road Dept. v. Tharp*, 1 So. 2d 868 (Fla. 4th DCA 1941) (state road department's partial filling of stream that raised water levels so as to reduce capacity of millrace thereby decreasing by 50% the capacity of water powered mill); *Brevard County v. Blasky*, 875 So. 2d 6 (Fla. 5th DCA 2004) (county's construction and maintenance of dike and dam that flooded marshy lands for mosquito control); *Martin v. City of Monticello*, 632 So. 2d 236 (Fla. 1st DCA 1994) (city's discharge of more than one inch of treated sewage effluent); *Leon County v. Smith*, 397 So. 2d 362 (Fla. 1st DCA 1981) (city's approval of subdivision plat, acceptance of ownership and maintenance of drainage system within subdivision and interconnection of drainage system with upstream drainage system); *Associates of Meadow Lake*, 706 So. 2d at 50 (city's construction of park without properly functioning drainage system); *South Florida Water Management District v. Steadman Stahl P.A. Pension Fund*, 558 So. 2d 1087 (Fla. 4th DCA 1990) (water management district's change in policies regarding maintenance of its water management structures); The courts in other jurisdictions have held that obstructions of or failure to maintain drainage canals causing overflows and flooding of property states a claim for a taking requiring compensation. *Bauer v. County of Ventura*, 289 P.2d 1 (Ca. 1955); *Mattoon*, 617 P. 2d at 1347, 1350.

establishing joint and several liability, a plaintiff does not bear the burden to establish the relative contributions of the government actors to the overall flooding problem. *Celotex Corp. v. Copeland,* 471 So. 2d 533, 536-38 (Fla. 1985). Rather, it is defendant's burden.[6]

(3) Public Purpose

FDOT is an agency of the State of Florida authorized pursuant to chapters 334, 335, 337 and 338, Florida Statutes, to plan, design, engineer, finance, construct, operate and maintain the public roads that comprise the Florida State Highway System, including I-95 and SR 50 in Brevard County. It is undisputed that FDOT's actions alleged to cause or contribute to the flooding of the Properties were taken pursuant to this authority, and for a proper public purpose.

St. Johns is a water management district created pursuant to chapter 373, Florida Statutes, to, among other things: (i) regulate and manage surface water

---

[6] It is difficult to apportion flooding damages as between the Defendants in this case since their actions result in both concurrent and successive causation producing Plaintiffs' total injuries. *See McLeod v. American Motors Corp.*, 723 F. 2d 830 (11th Cir. 1984). Where liability is reasonably apportionable, it should be apportioned between the defendants. If not reasonably apportionable, each defendant is fully liable to the plaintiff. *Id.* Each defendants' separate contribution to the flooding and it is difficult if not impossible to apportion.

and related resources, including water levels in drainage works; (ii) adopt and enforce policies and rules and issue permits and orders relating to surface water management systems; maintain administrative and judicial enforcement actions; and acquire, condemn and manage real property. §§ §§ 373.016, .086(1), .069(1), .086(1), .103(1), .103(4), .119, .129, .136, .139, .191, .171, .418, & .413, Fla. Stat. **It is undisputed that St. Johns' conduct and activities actions alleged to cause or contribute to the flooding of the Properties were taken pursuant to this authority and for a proper public purpose.**

(4) **Compensation**

It is undisputed that FDOT and St. Johns have failed and refuse to compensate Plaintiffs for their claimed takings.

V. PLAINTIFFS' INJUNCTION CLAIM

Under Florida law, injunction will lie in favor on a landowner to prevent or abate flooding caused by another under a trespass theory. A party seeking injunctive relief against the government for flooding must prove that (i) the harm that will occur as a result of the flooding is irreparable; (ii) that the landowner has a clear legal right to the relief sought; (iii) that the landowner lacks an adequate remedy at law; (iv) that the requested injunction would not be contrary to the interest of the public. *Weekley v. Pace*

Assembly Ministries Inc., 671 So. 2d 220, 220 (Fla. 1st DCA 1996). The Fifth District Court of Appeals holds that a party cannot recover for injunctive relief against the government for a permanent flooding because inverse condemnation constitutes an adequate remedy at law. *DiChristopher v. Board of County Com'rs*, 908 So. 2d 492, 498 (Fla. 5th DCA 2005). The holding arguably does not apply to an injunction for flooding of a temporary character. Thus, a landowner seeking inverse condemnation based on flooding is entitled to seek injunctive relief in order to secure his or her ability to abate flooding if the court does not grant the relief in inverse condemnation because the flooding had already occurred before the landowner acquired title in the subject property. *See Department of Transp. v. Burnette*, 384 So. 2d 916 (Fla. 1st DCA 1980).

VI. DEFENDANTS DEFENSES

In response to the claims asserted above, Defendants have asserted certain affirmative defenses, including (i) exhaustion of administrative remedies due to failure to apply for permit to cure flooding; (ii) sovereign immunity; (iii) failure to state cause of action on grounds that St. Johns can't be liable for issuance of permits; (iv) reasonable use; (v) statutory immunity; (vi)

* * *

reliance upon the representation by the party claiming the estoppel; and (iii) a change in the position of

the party claiming the estoppel to his detriment. *Jewitt v. Leisinger*, 655 So. 2d 1210, 1212 (Fla. 4th DCA 1995). The United States has produced no evidence to date establishing any of the elements of an equitable estoppel as against Plaintiffs.

(8) Laches

Laches is an affirmative defense based on unreasonable delay in enforcing a right coupled with a disadvantage to the person against whom the right is sought to be asserted. *George G. Sharp, Inc. v. Doric Marine, Inc.*, 544 So. 2d 228 (Fla. 3d DCA 1989). The doctrine of laches has been legislatively modified by section 95.11(6), Florida Statutes (2006), and as such, laches will not bar a claim if the statute of limitation has not run unless there is a strong showing in equity that it should apply. *Smith v. Branch*, 391 So. 2d 797, 798 (Fla. 2d DCA 1980). For the reasons previously discussed, the statute of limitations did not run as against Plaintiffs' easement claims, its inverse condemnation or trespass claims. Where a party is claiming laches before the requisite statute of limitation has run, he or she must prove "(1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense." *McCray v. State*, 699 So. 2d 1366, 1368 (Fla. 1997) (internal citations and quotations omitted). This defense must be proven by clear and positive evidence. *Smith*, 391 So. 2d 797; *Peacock v. Firman*, 177 So. 2d 560 (Fla. 3d DCA 1965); *Wagner v. Moseley*, 104 So. 2d 86 (Fla. 2d DCA 1958). To date, the United States has

not produced any evidence of lack of diligence on the part of Plaintiffs or that it would be in anyway prejudiced.

Respectfully submitted,

BRICKLEMYER SMOLKER & BOLVES, P.A.

By: /s/ Ethan J. Loeb

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

MODERN, INCORPORATED, a Florida Corporation and FIRST OMNI SERVICE CORPORATION, a Florida Corporation,

Plaintiffs,

vs.

STATE OF FLORIDA, DEPARTMENT OF TRANSPORTATION, ST. JOHNS RIVER WATER MANAGEMENT DISTRICT, and UNITED STATES FISH AND WILDLIFE SERVICE,

Defendants.

Case No.: 6:03-CV-718-ORL-31DAB

ST. JOHNS RIVER WATER MANAGEMENT DISTRICT,

Third Party Plaintiff,

vs.

THE GREAT OUTDOORS PREMIER R.V./GOLF RESORT, INC. and BREVARD COUNTY,

Third Party Defendants.

PLAINTIFFS' CLOSING STATEMENT

(Filed Jul. 30, 2007)

Plaintiffs, Modern, Incorporated ("Modern") and First Omni Service Corporation ("First Omni") (collectively, the "Plaintiffs"), through their undersigned attorneys, hereby submit their Closing Statement.

* * *

The Titusville Fruit and Farm Lands Company completed construction of the Drainage Canal System in 1914. (T. 699). Aerial photographs from 1943, 1958, and 1969 show the Drainage Canal System in a robust condition (Pl. Ex. A251, 252, 253, 254), which is far beyond the 20-year prescriptive right requirement under Florida law, and since then the landowners within the Plat and the general public have used the ditches to drain their lands to the present day. (T. 702, 706-08; Pl. Ex. A147, 251, 252, 253, 254). Most of the Drainage Canal System was located within the areas designated "road" on the plat; however, there were some instances where the Drainage Canal System was located adjacent to these designated areas. In either instance, the Drainage Canal System existed for the requisite twenty year time period, and the use was open to the USFWS as evidenced by the Baker Study Map (Pl. Ex. A-16), the USFWS acquisition map (Pl. Ex. A284), USFWS documentation (Pl. Ex. A18, 22, 147), and the testimony of Mr. Leenhouts (T. 505-11) and Mr. Pointevett (T. 1494). All of the elements for prescription have

been met; Plaintiffs are entitled to a judgment under the theory of prescriptive easement.

It remains to only note that a party cannot typically prescriptively acquire easement interests against the government. While prescription cannot be made against the government during its ownership, a landowner can acquire prescriptive rights over lands before the government acquires said lands. Such is the case here, and prescriptive easements exist.

b. Taking.

Under Federal and Florida law, government action that results in or authorizes a permanent physical occupation or invasion of property, however minimal, constitutes a *per se* taking. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). The United States Supreme Court has clearly held that a taking is readily found where an owner is compelled to suffer *any* permanent physical invasion of property by flooding. *Pumpelly v. Greenbay*, 80 U.S. (13 Wall) 166, 181 (1871).[29] To rise to the level of a compensable taking, flooding must constitute an actual, permanent physical invasion of land amounting to an

---

[29] *See also Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 427-428 (1982); *Storer Cable T.V. of Florida v. Summerwinds Apartments Assocs., LTD*, 493 So. 2d 417 (Fla. 1986); *Aspen-Tarpon Springs Limited v. Stuart*, 635 So. 2d 61 (Fla. 1st DCA 1994)

appropriation, rather than mere injury to property. *Kendry v. State Rd. Dept.*, 213 So. 2d 23 (Fla. 4th DCA 1986). According to the Fifth District Court of Appeal in *Associates of Meadow Lake Inc. v. City of Edgewater*:

> [t]here is no absolute rule regarding the magnitude or duration of flooding necessary to constitute a taking. It is generally recognized that a single flood of short duration or occasional temporary flowage, is not sufficient to constitute a taking. Conversely, substantial periodic flooding, coupled with a likelihood of recurrence, has been held to constitute a taking . . . Most formulations of the rule speak of *permanent* invasions, even though "predictable periodicity" appears to be an acceptable substitute for "permanency."

706 So. 2d 50, 51 (Fla. 5th DCA 1998) (quoting with approval § 606[2][c], *Nichols on Eminent Domain*).

Flooding is considered permanent if the rainfall conditions causing it are reasonably expected to continually recur in the future. *Kendry*, 213 So. 2d at 27; *Elliott v. Hernando County*, 281 So. 2d 395 (Fla. 2d DCA 1973); *Hillsborough County v. Gutierrez*, 433 So. 2d 1337 (Fla. 2d DCA 1983). A wide variety of governmental conduct and actions resulting in

permanent flooding have been held to by Florida courts to constitute a taking.[30]

The most relevant case addressing the takings clause and water management district policy decisions is *South Florida Water Management District v.*

---

[30] *See State Rd. Dept. v. Tharp,* 1 So. 2d 868 (Fla. 4th DCA 1941) (state road department's partial filling of stream that raised water levels so as to reduce capacity of millrace thereby decreasing by 50% the capacity of water powered mill); *Brevard County v. Blask*, 875 So. 2d 6 (Fla. 5th DCA 2004) (county's construction and maintenance of dike and dam that flooded marshy lands for mosquito control); *Martin v. City of Monticello,* 632 So. 2d 236 (Fla. 1st DCA 1994) (city's discharge of more than one inch of treated sewage effluent); *Leon County v. Smith*, 397 So. 2d 362 (Fla. 1st DCA 1981) (city's approval of subdivision plat, acceptance of ownership and maintenance of drainage system within subdivision and interconnection of drainage system with upstream drainage system); *Assocs. of Meadow Lake,* 706 So. 2d at 50 (city's construction of park without properly functioning drainage system); *South Florida Water Mgmt. Dist. v. Steadman Stahl, P.A. Pension Fund,* 558 So. 2d 1087 (Fla. 4th DCA 1990) (water management district's change in policies regarding maintenance of its water management structures); *Gutierrez,* 433 So. 2d at 1337 (county's approval of drainage plan and failure to ensure that drainage system constructed according to plan); *Elliott,* 281 So. 2d 395 (county's construction of road without adequate culverts by); *Dept. of Transp. v. Burnette,* 384 So. 2d 916 (Fla. 1st DCA 1980) (state road department's modification of highway drainage system over a period of years); *Kendry,* 213 So. 2d 23 (state road department's raising and widening of highway); The courts in other jurisdictions have held that obstructions of or failure to maintain drainage canals causing overflows and flooding of property states a claim for a taking requiring compensation. *Bauer v. County of Ventura,* 289 P.2d 1 (Ca. 1955); *Mattoon,* 617 P. 2d at 1347, 1350.

Steadman Stahl, P.A. Pension Fund, 558 So. 2d 1087 (Fla. 4th DCA 1990). In *Steadman Stahl,* the water management district maintained a water conservation area adjacent to the plaintiff's lands, and that the water management district elected to alter its policies concerning the land management practices for the said area. *Id.* at 1088. As a result of the change in policy, the plaintiff's lands flooded. *Id.* The landowner sued the water management district, and the Fourth District Court of Appeal concluded that the change in policy resulted in a taking of the plaintiffs' land. *Id.*

(i) St. Johns Has Compelled Modern to Suffer The Continued Physical Invasion of Its Property By Floodwater From Which Modern Has Rights To Be Free.

Ms. Skosberg's own analyses using Mr. Sprinkle's 1970s model, corrected for what she contends are its major errors, underscores the undisputed testimony of every drainage expert in this case. *The weirs in EW-1 and NS-1 and the 500 foot plug in NS-1 are causing flooding of Modern's properties.* This ultimate fact is beyond dispute and Defendant's do not contend otherwise. The issue is whether St. Johns by its actions or omissions has caused or is perpetuating the flooding. The testimony and evidence clearly establishes that St. Johns has and continues to compel Modern to suffer a physical

invasion of its property by floodwaters of which Modern has a right to be free. In so doing, St. Johns has effectively used its authority under chapters 373, Florida Statutes, and 403 Florida Statutes, to impress a flowage easement on Modern's property.

Specifically, St. Johns permitted the 4-laning of SR 50, including its dysfunctional drainage system, the filling in of NS-2 at the Great Outdoors entrance, and the Hacienda Road mitigation. St. Johns also has acquiesced in and failed to require removal of numerous known, unpermitted man-made blockages of the Drainage Canal System on the Refuge downstream of Modern's property and on Modern's property, including the 500 foot section of NS-1 on Modern's property into which an unknown party bulldozed the spoil bank around 1985-1986 timeframe. And, **after Modern cleaned-out NS-1 and EW-1 to their original design specifications to abate the flooding of its property caused by large amounts of naturally occurring upstream floodwater and artificial additions from the City of Titusville, St. Johns: (i) declared the draining of Pond 1 and the 600-800 acre area that would otherwise be drained by NS-1 and EW-1 to constitute a public emergency requiring immediate action to block such draining; (ii) ordered USFWS to install weirs in NS-1 and EW-1 effectively preventing Modern from utilizing EW-1 and NS-1 to drain the floodwaters; (iii) issued and enforced an Administrative Complaint and Order that required Modern to restore and**

maintain the illegally filled 500 foot long obstruction in NS-1 on Modern's property; (iv) formulated and applied non-rule policy that effectively imposed a moratorium on all types of exempt drainage canal maintenance thereby limiting Modern's options to maintain EW-1 and NS-1 to routine custodial maintenance (and no maintenance on the north 500 of NS-1); (v) formulated and applied non-rule policy that effectively extinguished Modern's ability to abate the floodwaters by performing routine custodial maintenance to the original design specifications of NS-1 and EW; (vi) after ultimately prevailing against Modern in administrative proceedings initiated by Modern regarding the Emergency Order, sought unreasonable, uncalled for, and draconian administrative fines and penalties against Modern in order to punish it; (iv) [sic] thereafter initiated and prosecuted an unnecessary civil enforcement action against Modern seeking unreasonable, uncalled for, and draconian, penalties and fines despite the fact that Modern had indicated prior to the filing of the suit that it would comply with the Administrative Complaint and Order; (vii) [sic] failed to require USFWS to remove known obstructions the Drainage Canal System on the Refuge that are contributing to flooding of Modern's property; and (viii) [sic] failed to require that FDOT address its ill-designed and failed SR 50 drainage system that is impounding water north of SR 50. In short, St. Johns, in order to protect the wetlands and wildlife on the Refuge (like the policy decisions referenced in the *Steadman Stahl* case), **has used its authority to**

extinguish Modern's ability to abate flooding by lawfully maintaining the drainage canals. In so doing, St. Johns has impressed a permanent flowage easement on Modern's property.

The effect of St. Johns's actions and omissions is to compel Modern to suffer the continued physical invasion by floodwaters, and to leave Modern with no option to abate the flooding other than to apply for an ERP permit. Any ERP permit – which St. Johns did not bind themselves to approve – if approved, would require Modern to construct, at its expense, an elaborate drainage work-around likely requiring use of offsite lands that Modern neither owns nor has any rights in and which will likely cost millions of dollars to construct in addition to the millions of dollars in mitigation costs.

As the United States Supreme Court held in *Pennsylvania Coal Company v. Mahon*, 260 U.S. 393 (1922), the protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation. *Id.* at 415. The Court stated further a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Id.* "When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the

Constitution of the United States." *Id.* "The general rule at least is that while property may be regulated to a certain extent, if regulation goes to [sic] far it will be recognized as a taking." *Id.* at 416. ***St. Johns has gone too far.***

ii. FDOT Is Liable For Taking Modern's Property By Contributing To The Causes of The Flooding.

The only real disputed issue is whether the secondary obstructions attributable to FDOT are contributing to the flooding of the Properties. The testimony and evidence, taken as a whole, establishes that these other obstructions are contributing to the flooding to some degree. The testimony of Mr. Sprinkle, Mr. Brown, Ms Skosberg and Mr. Llewelyn taken in its totality establishes that the canal filling west of Hacienda Road associated with FDOT's wetland mitigation has little effect, ***provided that the risers in the culverts at Hacienda Road are not in place.*** (T. 853). Mr. Sprinkle, Mr. Brown, and Ms. Skosberg all agreed that if the risers in the culverts at Hacienda Road are fully extended, Hacienda Road becomes the control elevation for upstream flooding. It averages elevation 14 feet, which means that floodwaters will translate

* * *

enclosed, the land may still be adversely possessed when it is usually cultivated or improved. Section 95.18(2)(b), Florida Statutes.

USFWS offered no evidence that it paid property taxes for the right of ways or the drainage ditches. As a matter of law, the adverse possession defense fails. Assuming USFWS did pay taxes, its defense still fails because it never created a perimeter fence around the entire Refuge, across the drainage ditches, and plant crops for agricultural purposes within the right of ways or the ditches. (T. 642-49). The adverse possession defense lacked supportive evidence; USFWS's defense must be rejected.

CONCLUSION

For the reasons set forth herein, Plaintiffs respectfully request final judgment in their favor on Counts I and II against St. Johns and FDOT, or alternatively, Count V, and Counts III and V against all Defendants.

Respectfully submitted,

BRICKLEMYER SMOLKER & BOLVES, P.A.

By: /s/ Ethan J. Loeb

David Smolker, Esq.
Fla. Bar No. 349259
Ethan J. Loeb, Esq.
Fla. Bar No. 668338
500 East Kennedy Boulevard,
Suite 200
Tampa, Florida 33602
(813) 223-3888
(813) 228-6422
Attorneys for Plaintiffs,
Modern, Inc. and
First Omni Service Corp.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that this the 30th day of July, 2007, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to the following: **William H. Congdon, Esq.** and **Stanley J. Niego, Esq.**, St. Johns River Water Management District, 4049 Reid Street, Palatka, FL 32177; **Walter Kelly, Esq.**, Florida Department of Transportation, 605 Suwannee Street, Room MS-58, Tallahassee, FL 32399-0458; **Samuel Armstrong**, Office of the U.S. Attorney, 501 West Church Street, Suite 300, Orlando, FL 32805; **Kevin A. Reek, Esq.** and **Michael Gay, Esq.**, Foley & Lardner, 111 North Orange Avenue, Suite 1800, Orlando, FL 32801; **Scott L. Knox, Esq.** and **Morris Richardson, Esq.**, Office of the Brevard County Attorney, 2725 Judge Fran Jamieson Way, Building C, Suite 308, Viera, FL 32940.

s/ Ethan J. Loeb
Florida Bar No.: 0668338

No. 08-11799-E

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

MODERN, INCORPORATED, a Florida Corporation, and FIRST OMNI SERVICE CORPORATION, a Florida Corporation,
Appellants,
v.
STATE OF FLORIDA, DEPARTMENT OF TRANSPORTATION, ST. JOHNS RIVER WATER MANAGEMENT DISTRICT, and UNITED STATES FISH AND WILDLIFE SERVICE,
Appellees.

ON APPEAL FROM THE DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA,
ORLANDO DIVISION
Civ. Action No. 6:03-CV-718-ORL-31DAB
HON. GREGORY A. PRESNELL

INITIAL APPELLATE BRIEF

David Smolker
Ethan J. Loeb
BRICKLEMYER SMOLKER & BOLVES, P.A.
500 East Kennedy Boulevard, Suite 200
Tampa, Florida 33602
(813) 223-3888/(813) 228-6422 facsimile
Attorneys for Appellants

* * *

Under Florida law, it is not necessary that government actually directly cause or create the condition that results in flooding. It is enough that they approve or authorize the activities of others that result in the flooding. *See Hillsborough County v. Gutierrez*, 433 So. 2d 1337 (Fla. 2d DCA 1983) (government failed to enforce the drainage plan it had approved for development of property by a third party that resulted in flooding).[14] Moreover, Florida precedent permits inverse condemnation actions for the taking of a flowage easement.[15]

B. The Effect Of St. Johns' Activities And Conduct Was And Is To Authorize And Compel Modern To Suffer The Continued Physical Invasion Of Its Property By Upstream Floodwaters And To Interfere With Its Common Law Flowage Easement

It is undisputed that Modern's property is being flooded. The District Court found that "the biggest contributing factor to the flooding is the blockage of

---

[14] *Also see, Frustuck v. City of Fairfax*, 28 Cal. Rptr. 357, 363-63 (Cal. Ct. App. 1963; *Banks v. United States*, 69 Fed. Cl. 206, 212 (2006); *Harris County Flood Control Dist. v. Adam*, 56 S.W. 3d 665, 668-69 (Tx. Ct. App. 2001); *but see Phillips v. King County*, 968 P.2d 871 (Wash. 1998).

[15] *See Bensch v. Metro. Dade County*, 952. F. Supp. 790, 796 (S.D. Fla. 1996), citing *Anderson v. Bell*, 433 So. 2d 1202 (Fla. 1983) and *Leon County v. Smith*, 397 So. 2d 362 (Fla. Dist. Ct. App. 1st Dist. 1981).

NS-1 and EW-1 at or near the intersection of EW-1 and NS-1" and that "the excavation of NS-1 and EW-1 [is] enough to effectively drain Modern's property." (Doc. 458 at 268 & n. 27). It is beyond meaningful dispute: (i) that after Modern maintained NS-1 and EW-1 by excavating them to in order to abate the flooding of its property, the property was effectively drained; (ii) that St. Johns exercised its authority under chapter 373, Florida Statutes, to authorize installation of the weirs by USFWS and to require that Modern restore and maintain the blockages in NS-1 and EW-1; (iii) that these blockages result in continued regularly recurring flooding of Modern's property; and (iv) that the conduct and activities of St. Johns effectively interfered with Modern's ability to immediately abate the flooding of its property by performing routine custodial maintenance of EW-1 and NS-1 to return them to their original design specifications.

The effect of St. Johns' activities and conduct was and is to authorize and compel Modern to suffer the continued physical invasion of its property by upstream floodwaters. These floodwaters include surface waters that are being collected, channelized, cast and impounded upon Modern's property. They include natural and artificial additions from the Refuge and the City of Titusville. These are floodwaters that St. Johns is requiring remain impounded on Modern's property and that Modern has the private common law proprietary right to collect, channel and discharge off

of its property using EW-1, NS-1, the IRCC and the culverts beneath Hacienda Road.

In sum, St. Johns, by its conduct and activities, has effectively used its authority under chapter 373, Florida Statutes, to impress a negative flowage easement on Modern's property for the benefit of the public in order to facilitate the restoration of the floodplain of the St. Johns River by the United States and to protect the wetlands and wildlife on the Refuge.

C. The District Court's Conclusion That St. Johns' Conduct and Activities Could Not Be The Legal Cause of Any Taking Is Erroneous

The District Court concluded, as a matter of law, without citation to authority, that St. Johns was not liable for a taking because installation of the weirs in EW-1 and NS-1 and filling in of 500 feet of NS-1 "merely reestablished the status quo as it existed before Modern's unpermitted dredging and cannot themselves constitute a legal cause of any subsequent flooding." For the reasons set forth hereafter, the District Court's legal conclusion is erroneous.

1. The District Court's Ruling Is Contrary To Fundamental Nuisance Abatement Principles Inhering In The Right To Protect Property

Upon statehood, Florida adopted the English common law. Fla. Stat, § 2.01. It recognized that flooding resulting from failure to maintain a drainage ditch constituted an actionable nuisance abatable by immediate self-help.[16] Consistent with the English common law, the Florida Supreme Court holds that "regular and

* * *

instead requires the restoration and perpetuation of the condition causing the physical invasion of property.

---

[16] "So if my neighbor ought to scour a ditch, and does not, whereby my lands is overflowed, this is an actionable nuisance" and " . . . such nuisance may be abated, that is, taken away or removed by the party aggrieved thereby . . . " Sir William Blackstone, *Commentaries on the Laws of England* Bk. III, ch. 13 at 217, ch. 1 at 5 (Thomas M. Cooley ed.) (3rd Ed. Rev. 1884). Blackstone further explains that " . . . the reason why the law allows this private and summary method of doing one's self justice is because injuries of this kind, which obstruct or annoy such things as are of daily convenience and use, require an ***immediate*** remedy, and cannot wait for the slow progress of ordinary forms of justice." *Id.* At Book III, ch. 1, p.5.

4. The District Court's Ruling Is Contrary To Well-Established Takings Precedent Holding That Governmentally Authorized Or Compelled Physical Invasions of Property Constitute *Per Se* Takings

The District Court's ruling is also contrary to Florida and United States Supreme precedent consistently holding that government conduct that compels or authorizes the physical invasion or occupancy of private property by the public constitutes a *per se* taking requiring compensation without regard to the public interest underlying the government action or the impact on the landowner.

For example in *Loretto v. Teleprompter*, 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982), the United States Supreme Court, relying upon *Pumpelly*, held that a New York law requiring a landlord to allow CATV company to install cable device on an apartment building occupying one and one-half cubic feet of space constituted a taking. The rationale for the rule is that permanent physical occupation of another's property is the most serious form of invasion of an owner's property interests. *Id.* at 435. The Florida Supreme Court relying upon *Loretto* has adopted the identical test. *See Storer Cable T.V. v. Summerwinds Apartments*, 493 So. 2d 417 (Fla. 1986); also see, *Beattie v. Shelter Properties, IV*, 457

So. 2d 1110 (Fla. Dist. Ct. App. 1st Dist. 1984).[21] Thus, under Florida law, "[t]o establish a claim for inverse condemnation, the property owner is [only] required to demonstrate . . . a ***continuing*** physical invasion of the property . . . " *Bakus v. Broward Co.*, 634 So. 2d 641, 642 (Fla. Dist. Ct. App. 4th Dist. 1993).

If Modern repaired a hole in a fence on its property to exclude the public, and St. Johns required the reopening of the hole, and interfered with Modern's ability to repair the hole, thereby enabling public access to Modern's property, no one would seriously contend that such interference would escape liability under the Takings Clause. ***It should make no constitutional difference whether the invading force is the public or, as in the case, the public's drainage.***

In asserting the right to require restoration and maintenance of the blocked condition of EW-1 and NS-I, St. Johns, standing in the shoes of the public, necessarily asserts the right to produce ***all*** the results which naturally follow from the existence of the blocked condition. In effect, St. Johns asserts a right under chapter 373, Florida Statutes, to require the continued impoundment of floodwaters upon Modern's property. Such right is an easement which

---

[21] See also, *Kaiser Aetna*, 444 U.S. at 164 (U.S. Supreme Court held that imposition of a navigational servitude authorizing public access of a private marina as a condition of a federal dredge and fill permit was taking of easement of passage).

cannot be taken, even for public use, without compensation. *See Eaton v. B.C. & M.R.R.*, 51 N.H. 504 (N.H. 1872).

The District Court's conclusion that St. Johns conduct could not be a taking because it merely restored the status quo flooded condition of Modern's property cannot be squared with well-established physical invasion takings cases.

5. The District Court's Narrow Interpretation Of Legal Causation Ignores Applicable Established Proximate Causation Principles

Causation in takings cases closely follows tort proximate cause principles.[22] "[A] property loss compensable as a taking . . . results when the government intends to invade a protected property interest or the asserted invasion is the direct, natural, or probable

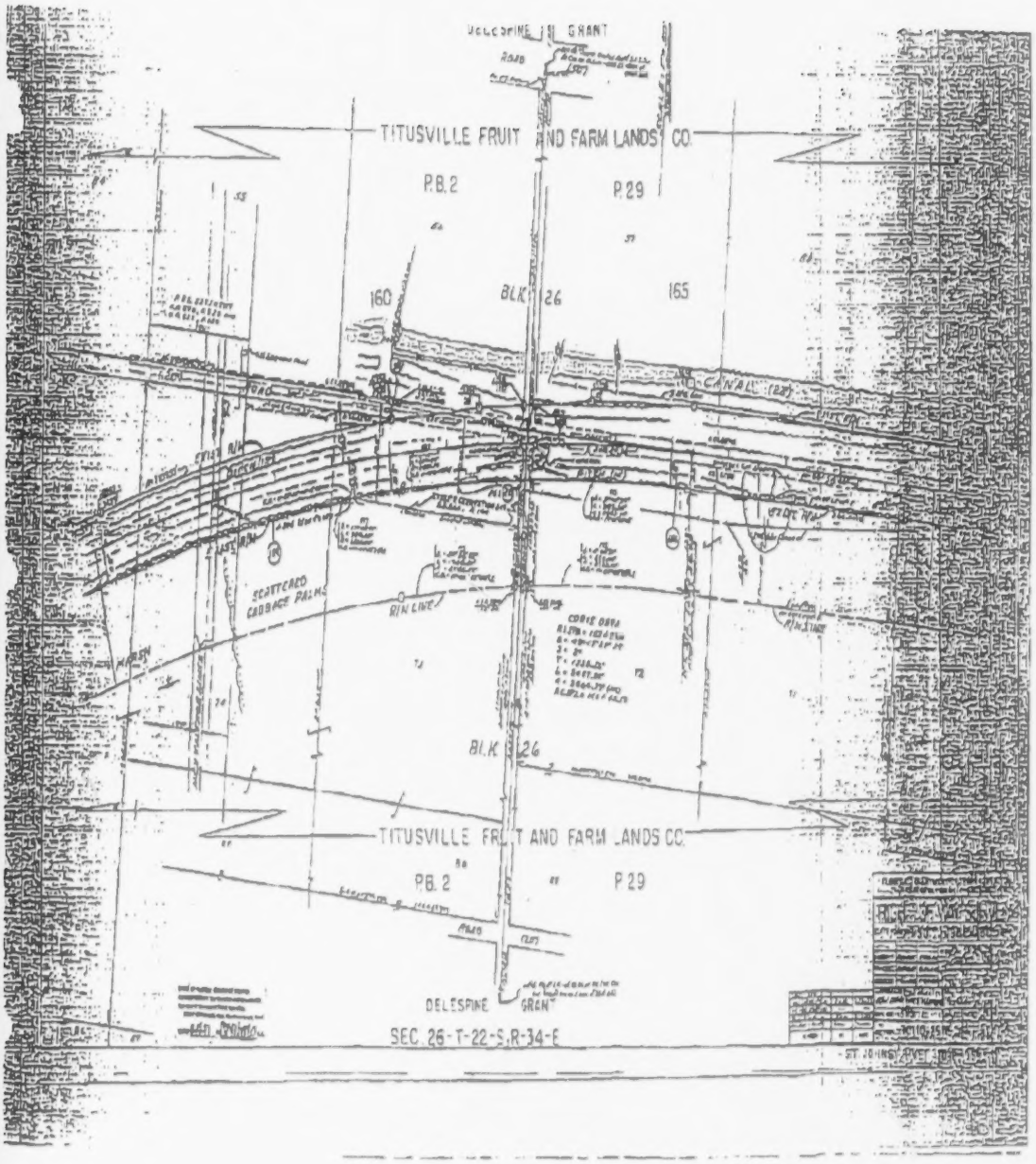
---

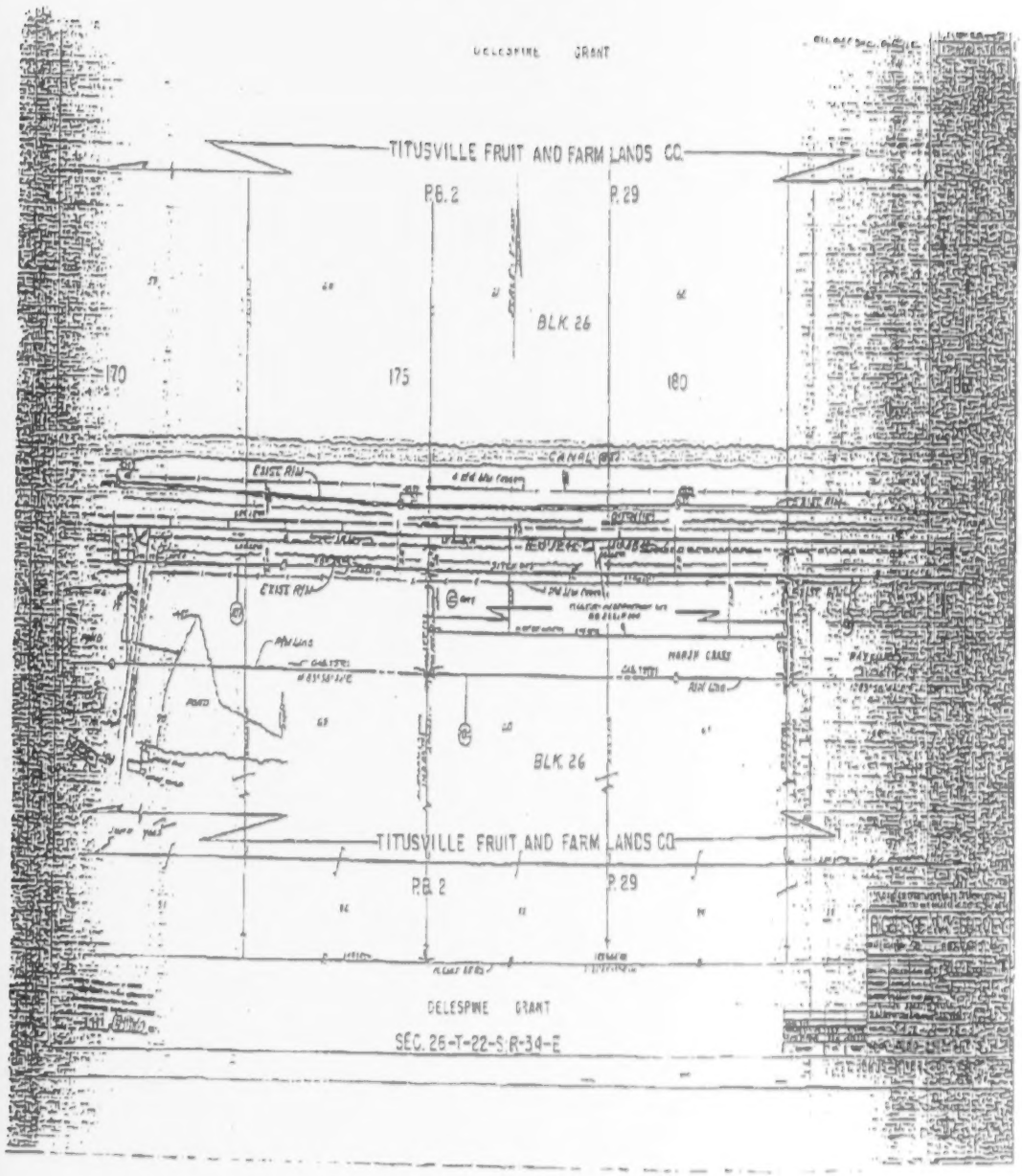
[22] *City of Monterey v. Del Monte Dunes at Monterey, LTD.*, 526 U.S. 687, 119 S. Ct. 1624, 143 L.Ed.2d 882 (1999) (at common law suits to recover just compensation traditionally framed as common-law tort actions); Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain*, 47-48 (1985) ("By the central premise of representative government, . . . [tort proximate cause] rules apply when government stands in the shoes of a private defendant [in a takings case]"). "'Inverse condemnation law is tied to, and parallels tort law.'" *Ridge Line, Inc. v. United States*, 346 F.3d 1346, 1355 (Cir. 2003) (quoting 9 Patrick J. Rohan & Melvin A. Reskin, *Nichols on Eminent Domain* § 34.03[1] (3d ed. 1980 & Supp. 2002); *Modern v. United States*, 404 F. 3d 1335 (Cir. 2005).

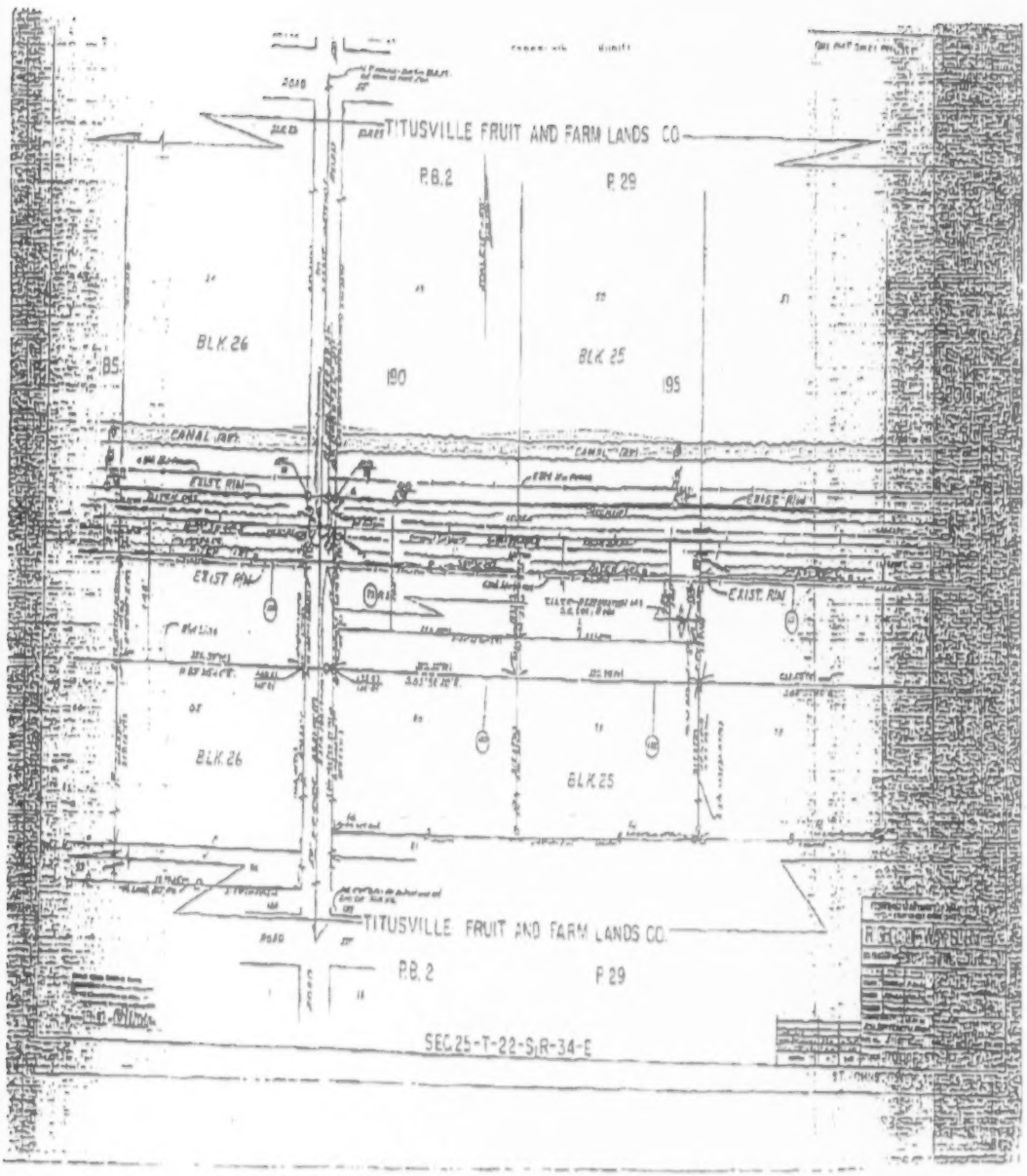
result of an authorized activity. . . ." *Banks v. United States*, 69 Fed. Cl. 206, 212 (2006).

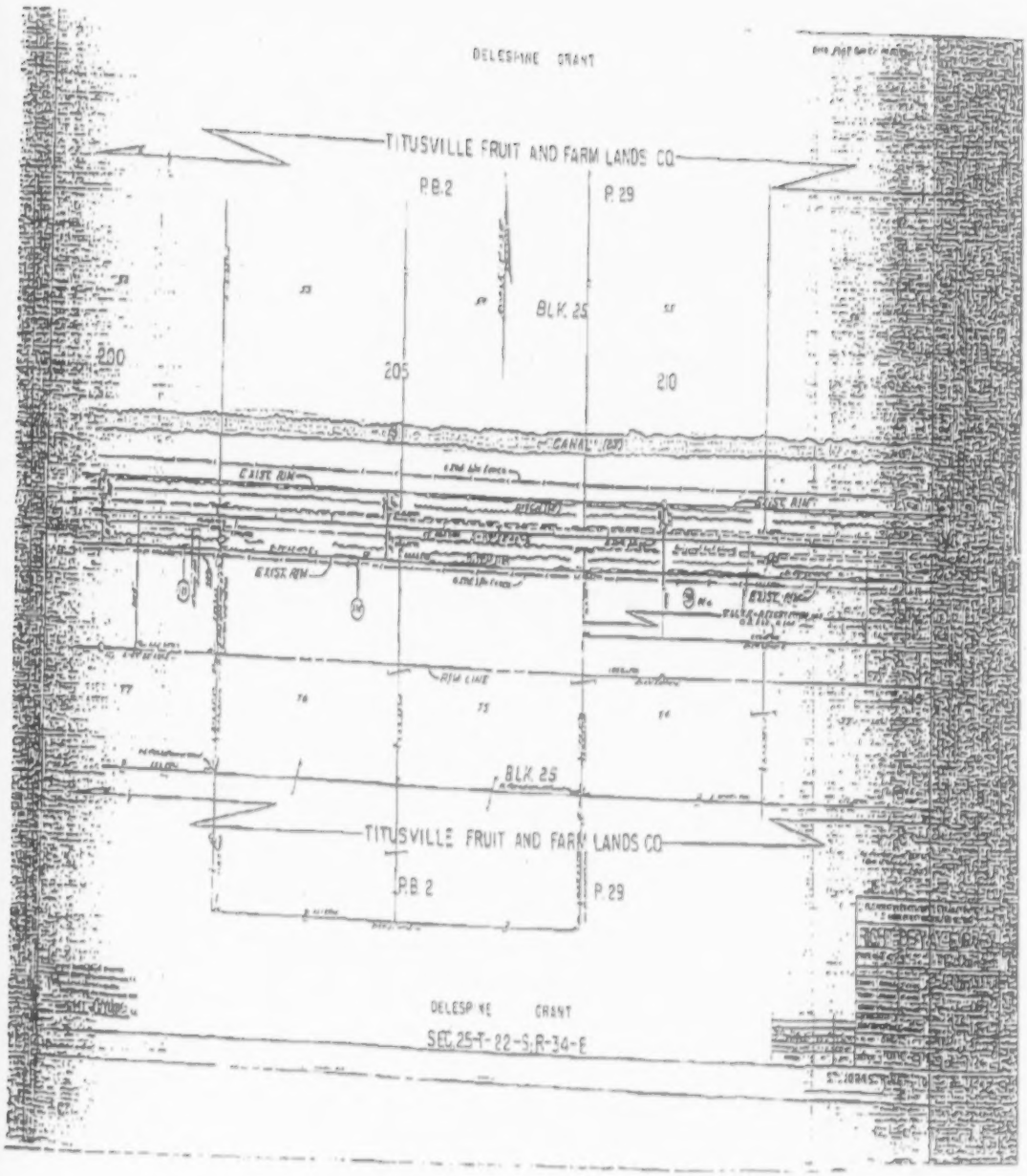
The District Court's narrow view of legal causation overlooks the fact that once Modern removed the blockages, thereby draining its property, the cause of any ***subsequent*** flooding became St. Johns' requirement that the preexisting condition be restored and maintained. Established continuing tort and indirect

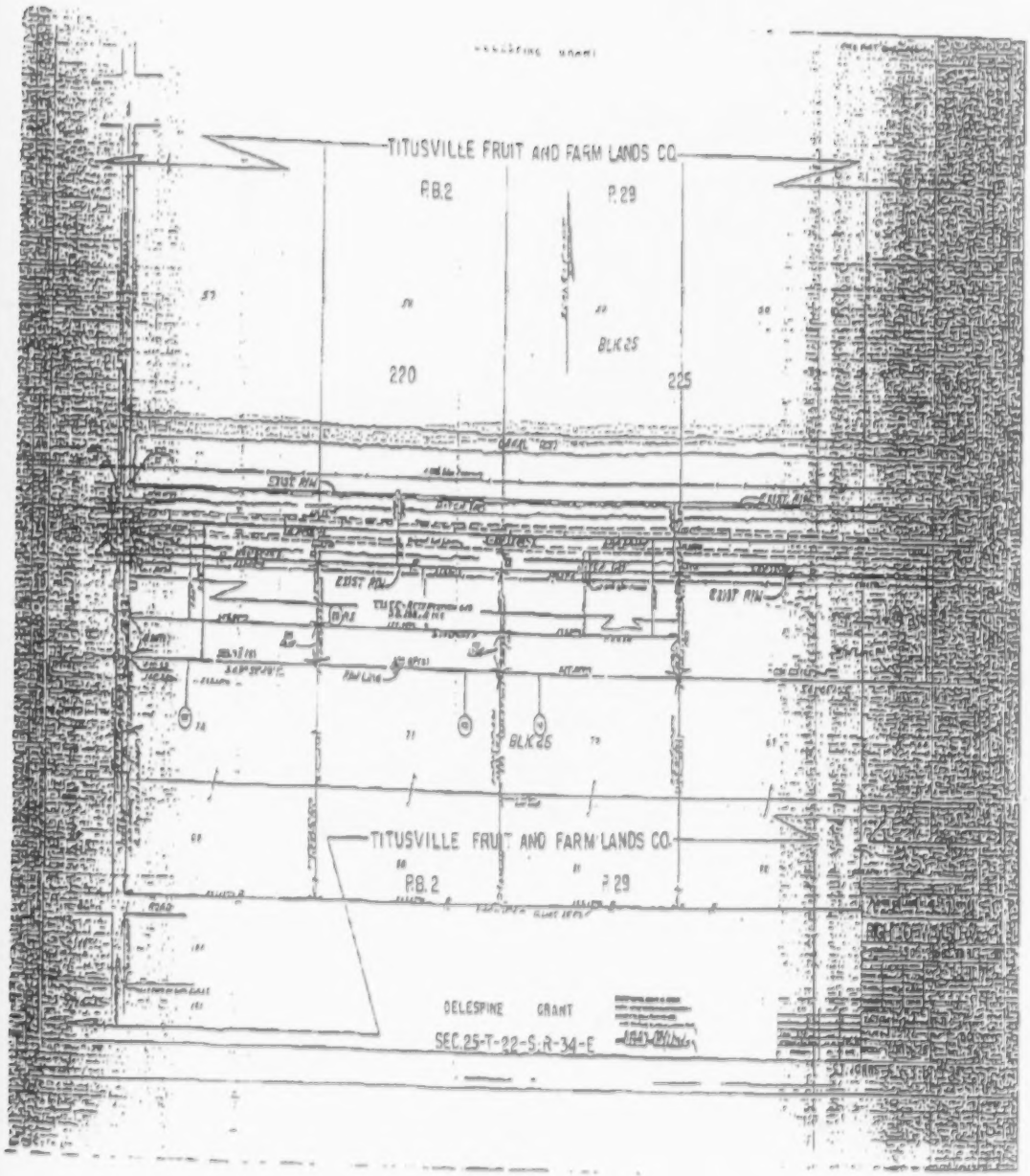
* * *

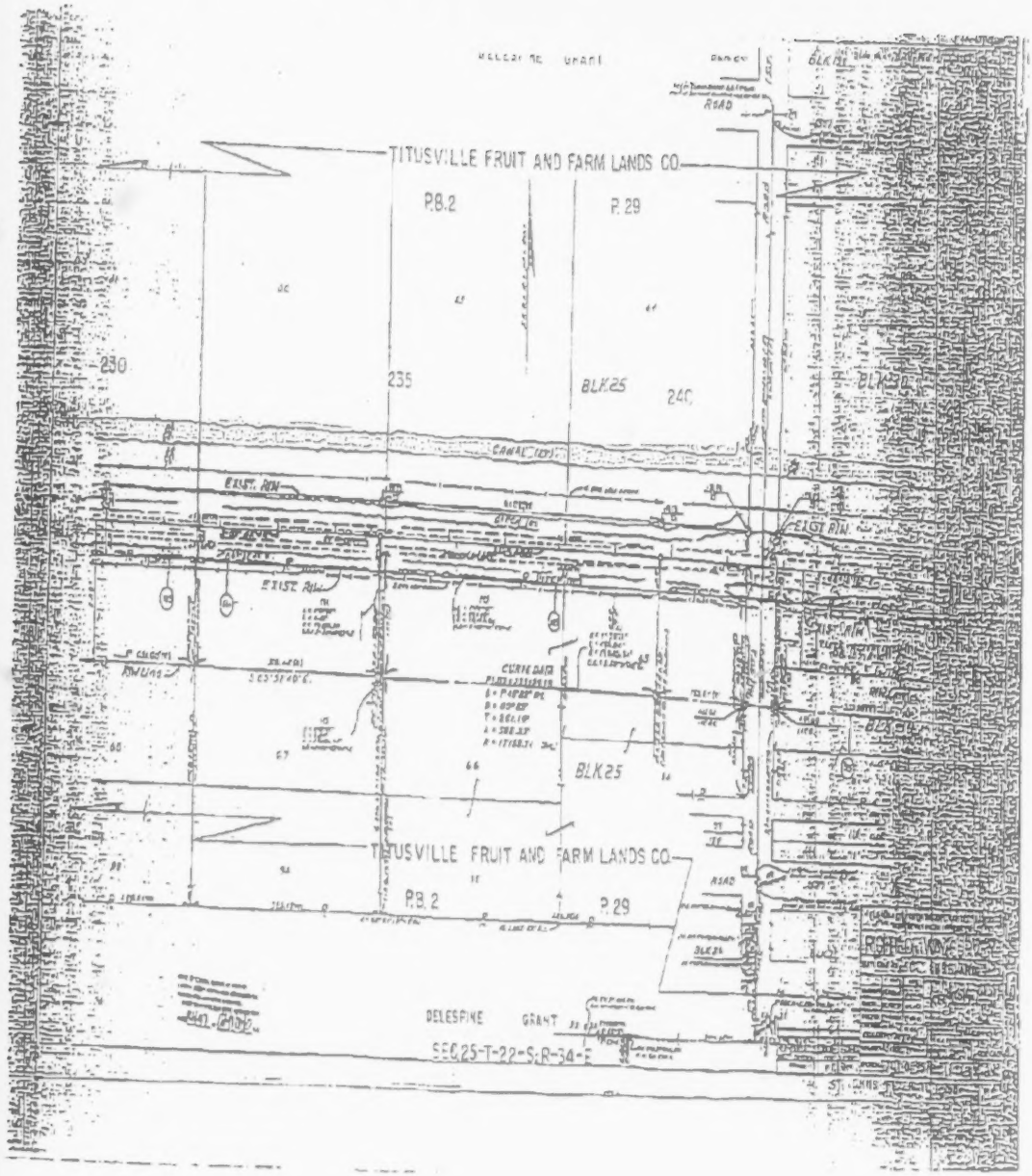

DELESPINE GRANT
TITUSVILLE FRUIT AND FARM LANDS CO.
P.B. 2
P. 29
160
BLK 26
165
CANAL
SCATTERED CABBAGE PALMS
R/W LINE
BLK 26
TITUSVILLE FRUIT AND FARM LANDS CO.
P.B. 2
P. 29
DELESPINE GRANT
SEC. 26-T-22-S, R-34-E


DELESPINE GRANT
TITUSVILLE FRUIT AND FARM LANDS CO.
P.B. 2
P. 29
BLK. 26
170
175
180
CANAL
EXIST R/W
EXIST R/W
MARSH GRASS
BLK. 26
TITUSVILLE FRUIT AND FARM LANDS CO.
P.B. 2
P. 29
DELESPINE GRANT
SEC. 26-T-22-S. R-34-E

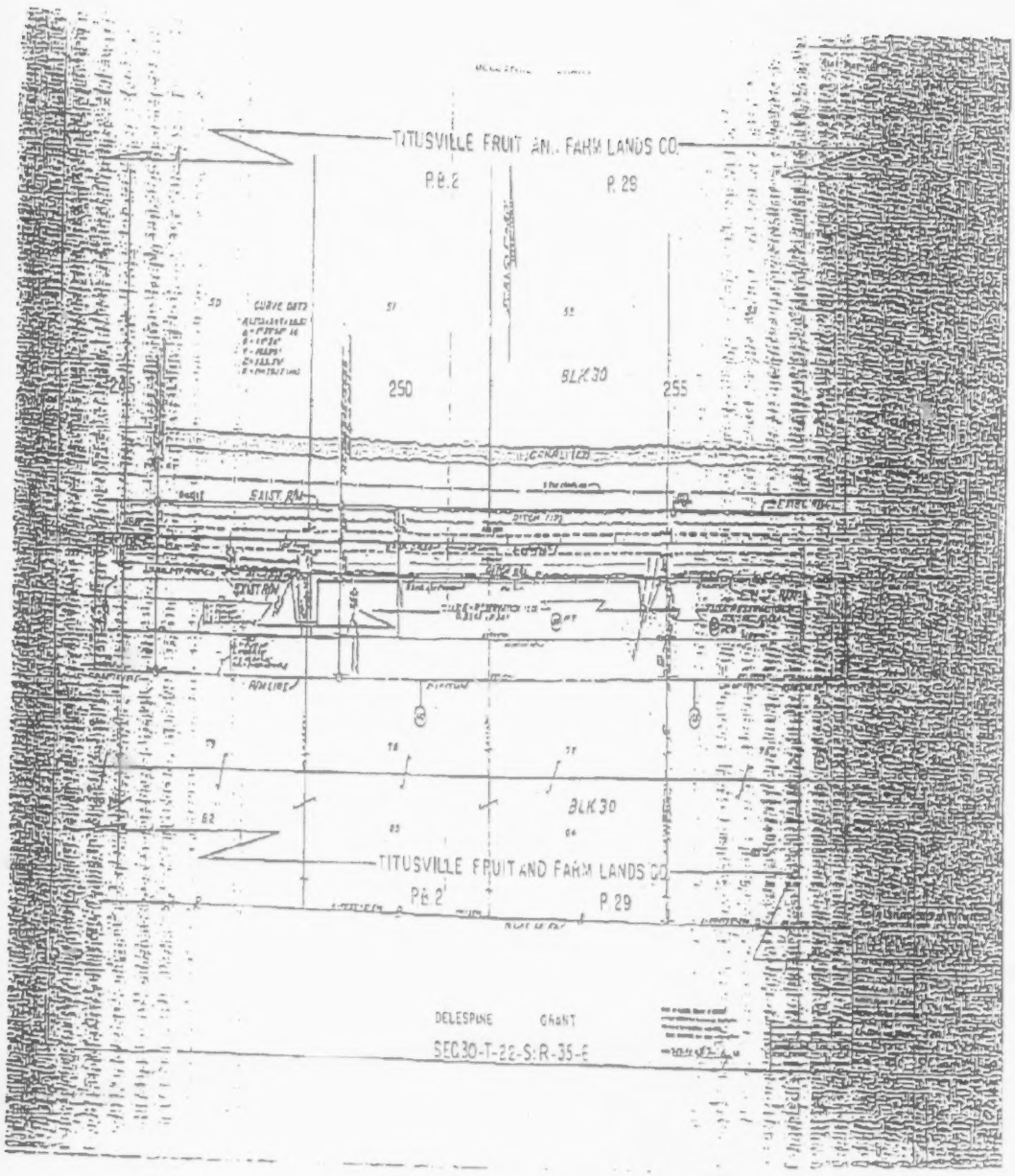

TITUSVILLE FRUIT AND FARM LANDS CO
P.B.2
P. 29
BLK. 26
BLK. 25
190
195
CANAL (ABD.)
EXIST. R/W
TITUSVILLE FRUIT AND FARM LANDS CO.
P.B. 2
P. 29
SEC. 25-T-22-S,R-34-E

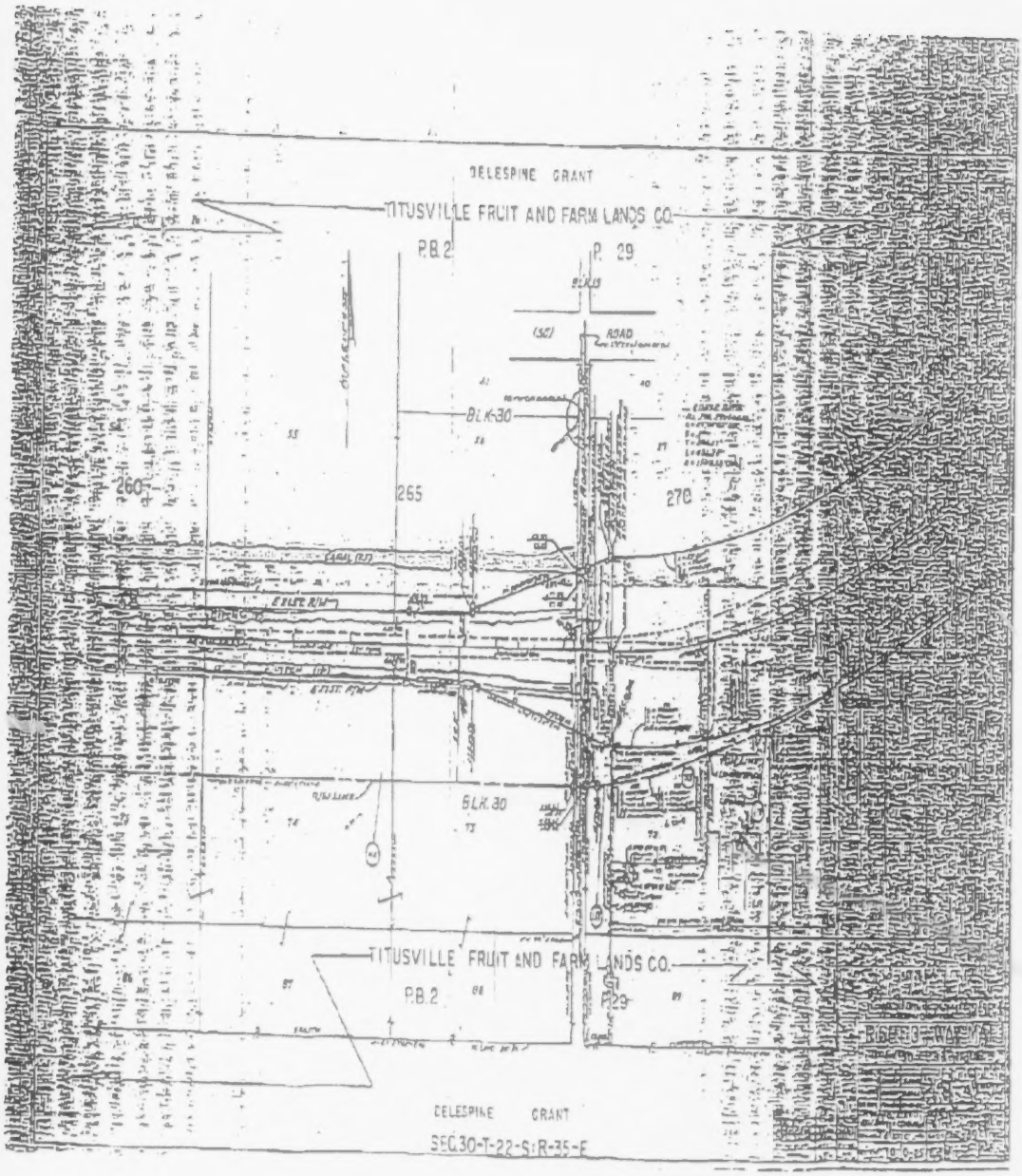

DELESPINE GRANT
TITUSVILLE FRUIT AND FARM LANDS CO
P.B.2
P. 29
BLK. 25
200
205
210
CANAL
EXIST RIM
RIM LINE
BLK 25
TITUSVILLE FRUIT AND FARM LANDS CO
P.B. 2
P. 29
DELESPINE GRANT
SEC. 25-T-22-S.R-34-E


TITUSVILLE FRUIT AND FARM LANDS CO.
P.B.2
P.29
BLK 25
220
225
EAST R/W
BLK 25
TITUSVILLE FRUIT AND FARM LANDS CO.
P.B. 2
P 29
DELESPINE GRANT
SEC. 25-T-22-S.R-34-E


TITUSVILLE FRUIT AND FARM LANDS CO
P.8.2
P. 29
230
235
BLK25
240
BLK30
CANAL
EXIST. R/W
ROAD
CURVE DATA
BLK25
TITUSVILLE FRUIT AND FARM LANDS CO
P.8.2
P. 29
DELESPINE GRANT
SEC.25-T-22-S.R-34-E

App. 66


TITUSVILLE FRUIT AN.. FARM LANDS CO.
P.B.2
P. 29
CURVE DATA
250
BLK 30
255
EAST RW
BLK 30
TITUSVILLE FRUIT AND FARM LANDS CO
P.B. 2
P. 29
DELESPINE GRANT
SEC 30-T-22-S-R-35-E


DELESPINE GRANT
TITUSVILLE FRUIT AND FARM LANDS CO.
P.B.2
P. 29
BLK.B
(SR)
ROAD
BLK-30
260
265
270
BLK. 30
TITUSVILLE FRUIT AND FARM LANDS CO.
P.B.2
P29
DELESPINE GRANT
SEC.30-T-22-S-R-35-E